Influencing justice beyond the nation state: Member State governments at the Court of Justice of the European Union

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Abstract

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The topic of this thesis is the use that member-state governments make of their opportunity to submit legal arguments in preliminary reference proceedings at the Court of Justice. Which Member States submit observations and which do not? What motives do Member States have for their submissions, and what influence do they have on the development of EU law? Can their influence be accommodated within existing models of European legal integration? And can we learn more about the Member States' policy preferences from their submissions to the Court?

The study of EU legal integration stands on the boundary of political science and law, and researchers have tended to develop theories using their own disciplines' perceptions. In doing so, political scientists have neglected judicial reasoning, while lawyers have overlooked the political and economic contexts of cases and the non-legal actors involved in them. This thesis uses both quantitative and qualitative empirical methods to develop a conceptual framework for evaluating different theories of EU legal integration.

The provisions that enable member-state governments to present arguments to the Court are introduced, and the data sources evaluated. The variations between the Member States are discussed, before states' motives are examined in more detail, and a taxonomy developed. The elements of the taxonomy are then demonstrated via the submissions of three chosen states: Denmark, Ireland and the UK. It is argued that governments' observations to the Court form part of a wider discourse between the Member States and the EU, in which they may better represent a Member State's true preferences than its voting behaviour at the Council. The thesis concludes that theoretical models of the relationship between governments and the Court must account for the variation between the Member States, their motives, and the Court's use of their submissions.

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In that respect, thanks are owed to an individual whose name I do not know. The student who intended to read Physical Geography at Anglia Ruskin University, but who changed their mind at the last minute and after I had been recruited to be their note-taker, made a difference to more lives than their own. I was instead (and to my not-very-well-concealed horror) assigned a law and politics student and rapidly became enthralled. Penny English fostered my fascination with the way cases on industrial chemicals, electricity bills, blackcurrant liqueur and fishing could provoke constitutional change, and David Feldman encouraged me to do a PhD. My husband and children have been unendingly supportive throughout the ups and downs of the process and have become well-informed about EU law; I am particularly proud when they shout corrections at the television (‘wrong court!’). As with Catherine, without their forbearance, this would not have been possible.

Contents

Any theory of European integration must notice and take account of the role of governments, clearly stating how that role is conceptualized.[1]

[1] Alec Stone Sweet and Thomas L Brunell, 'Constructing a Supranational Constitution : Dispute Resolution and Governance in the European Community' (1998) 92 AmPSR 63, 73.

Chapter 1: Introduction

This thesis considers what can be learnt about the role of member-state governments in European integration from the observations submitted by Member State governments in preliminary reference cases at the Court of Justice of the European Union. It argues that Member States' motives for taking part in proceedings at the Court are more diverse than they are commonly portrayed, and demonstrates that different states have different motives and levels of engagement with the Court. Attention is drawn to what empirical research can contribute to the critical analysis of the prevailing theories of European integration, examining three theories in particular: the classical law-textbook explanation of EU integration and two opposing theories of legal integration that stem from political science, neofunctionalism and intergovernmentalism. The thesis argues that each model is vulnerable to criticism in the way in which it envisages the role of Member States' submissions to the Court, and indicates an analytical framework that can be applied to all theoretical models of legal integration. It concludes by placing member-state governments' submissions to the Court within the broader argumentative space within which Member States convey their preferences to the EU.

The European Union had its historical origin in treaties that were conceived in public international law, but in some respects, the European Union has achieved a level of integration that makes it different from other international regimes: its law reaches deeply into the jurisdictions of the Member States, the scope of its influence continues to widen, and it has become a political power in its own right. The European Union's unprecedented status has made it the subject of considerable interest in several disciplines, including political science, international relations, economics, history and, above all, law. This has led to a proliferation of competing theories purporting to explain its unusual features and an extensive literature that is to a greater or lesser degree segregated by academic field.[2] To the extent that scholars in one area are aware of the work in others, there may be a significant degree of mutual incomprehension, and even those whose work can be described as interdisciplinary may find it challenging to reconcile theories that are rooted in the different disciplines.

[2] In 2013 alone, the legal bibliography of European integration shows that the Court's library acquired over 7,000 publications on the topic.

The interface between law and political science has been fruitful in producing competing theories of EU legal integration. They largely share the 'integration through law'[3] paradigm identified by, among others, Stein, Cappelletti, Seccombe &Weiler and Burley & Mattli.[4] This argues that European integration has been the consequence, in large part, of the constitutionalisation of the Treaties by the Court of Justice, initially via the classic cases that established the principles of supremacy and direct effect.[5] In other respects, they differ. Several theories attempt to explain the influence of the Court of Justice in terms that are drawn from political science, and these may struggle to account for the legal logic that is manifested in the Court's decisions. Meanwhile, it can be argued that the typical doctrinal account of the evolution of EU law leans too heavily on a subset of relatively rare 'constitutional' cases and ignores the cumulative effect of the everyday cases which make up most of the Court's case-load.

The entirety of the case law has, however, been recruited as empirical evidence for several of the leading theories of EU legal integration, with somewhat disappointing results. These theories will be outlined below, but this thesis argues that the same body of empirical evidence, evaluated in terms of the legal logic and policy content of Member States' observations, indicates an avenue of critical analysis that is applicable to all theoretical models of legal integration. The use of this particular basis for critical analysis stems from the belief that states' persistence in making observations—both as written briefs and as oral submissions—in cases before the Court of Justice demands an explanation, and that no model which overlooks this aspect of the interaction of Member States with the institutions of the EU can be considered adequate.

This is not to say that state observations have invariably been neglected. Stone Sweet and Brunell, in a 2012 paper, discuss the work of several researchers on the possible influence of the content of state observations on the Court's decisions.[6] The theories they discuss range from their own neofunctionalist approach, which does not regard observations as having a significant influence on the Court, to intergovernmentalist models that regard observations as implied threats

[3] An expression possibly first used by the Florence Project on 'Integration through Law', described by the editors in 'Integration Through Law: Europe and the American Federal Experience' in Mauro Cappelletti, Monica Seccombe and Joseph HH Weiler (eds), *Integration through Law Vol 1: Methods, Tools and Institutions* (De Gruyter 1986).

[4] Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 AJIL 1; Cappelletti, Seccombe and Weiler (n 3); Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 Yale LJ 2403; Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 International Organization 41.

[5] Case 26/62 *Van Gend en Loos*, EU:C:1963:1; Case 6/64 *Costa v ENEL* EU:C:1964:66.

[6] Alec Stone Sweet and Thomas L Brunell, 'The European Court of Justice, State Noncompliance, and the Politics of Override' (2012) 106 AmPSR 204, 205.

to the Court of non-compliance by the Member States.[7] Larsson and Naurin have analysed member-state governments' observations with a view to deciding on the best model to describe how the Court may adapt its decision-making to its political environment.[8] These authors take a narrowly-focused quantitative approach, mining the figures to find statistical support for (or against) the view that the Court complies with states' preferences as expressed in the observations submitted. By contrast, Granger has written extensively on governments' European litigation strategies taking a mixed approach, analysing patterns of intervention in court proceedings and conducting interviews with litigants and court officials.[9] It can be argued that it is this latter approach that seems likely to be more fruitful in explaining exactly *why* member state governments choose to invest time, money and effort in submitting observations to the Court, given that the evidence of such observations actually constraining the Court's decision-making is inconclusive.

Any explanation of governments' behaviour must be capable of being theorised in such a way as to test the competing models of European integration that jostle for precedence. It must also provide an adequate explanation for a phenomenon that is rarely mentioned other than in passing by the statisticians: that Member States differ both in their pattern of making references to the Court and in their likelihood of submitting observations, in their own or other Member States' cases, to an extent that cannot be explained simply by the sizes of their economies, their volumes of intra-state trade or the extent to which their domestic industries are affected by EU law.

Governments' participation in the preliminary reference process

The primary mechanism by which the Court gives an authoritative interpretation of European Union law is the preliminary reference procedure under Article 267 of the Treaty on the Functioning of the European Union (TFEU), whereby the Court interprets the law but leaves the referring national court to apply the law to the facts of its case. The procedure is not merely a

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[7] Clifford J Carrubba and Matthew Gabel, 'Do Governments Sway European Court of Justice Decision-Making ?: Evidence from Government Court Briefs' (IFR Working Paper Series No 2005-06) (2005).

[8] Olof Larsson and Daniel Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU' (2016) 70 International Organization 377.

[9] Marie-Pierre Granger, 'Governments in Luxembourg: How Do Governments Use EU Litigation to Protect National Policies or Influence EU Policy and Law-Making' (ECPR Fifth Pan-European Conference on EU Politics, Porto, 24-26 June 2010) <https://www.semanticscholar.org/paper/Paper-1596%3A-Governments-in-Luxembourg%3A-How-Do-Use-Granger/d95b6c5e9d3014db20e65728bc7fc66a5063c42a> accessed 31 July 2020.; also Thomas de la Mare and Catherine Donnelly, 'Preliminary Rulings and EU Legal Integration: Evolution and Stasis' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011), 363.

system by which national courts can check that their application of EU law is correct, although that meaning can be found in a literal reading of the Article. Instead, it forms a link between the legal system of the EU and the implementation of that legal system in the jurisdictions of the Member States that has three aspects. First, it has a supervisory aspect, ensuring uniformity in national implementation. Secondly, it has a participatory aspect, linking the day-to-day administration of justice in national courts with relevant European law. Thirdly, it provides an opportunity for EU law to evolve and move into new domains.

Through preliminary references, the Court has established principles that would have been revolutionary in an ordinary treaty of international law: the principle of supremacy—that Member States have relinquished sovereignty in certain areas to the EU;[10] the principle of direct effect—that individuals can vindicate their rights under EU law before their national courts,[11] and the principle of state liability to individuals.[12] Article 267 TFEU provides the fuel for 'the motor of integration',[13] operating (arguably) to make of the Court of Justice not just a constitutional court, but the creator of a constitution.[14]

Both direct actions and preliminary references provide an opportunity for national governments to be heard by the Court, via their right to submit legal arguments to the Court. This right is not confined to Member States' own cases, but applies to those of other nations as well; indeed, well over half of observations submitted by governments in preliminary references are in cases from other Member States. In practice, the submission of legal arguments to the Court represents the main avenue of communication between Member States and EU law, and as will be demonstrated in Chapter 3, two-thirds of such interactions with the Court consist of the submission of observations in preliminary reference cases.[15] These legal arguments are potentially a rich source of information on states' policy preferences and attitudes to legal and political integration. Some reasons why this potential may be unfulfilled will be discussed in Chapters 2 and 3.

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[10] Case 6/64 *Costa v ENEL* EU:C:1964:66.

[11] Case 26/62 *Van Gend & Loos* EU:C:1963:1.

[12] Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci* EU:C:1991:428.

[13] This term is variously applied to the European Commission, the Franco-German axis within the EU as a whole, and the Court. In the latter sense it has been placed in quotation marks on numerous occasions but not, as far as I can see, attributed to a source.

[14] Stein (n 4); Stone Sweet and Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (n 1). For a contrary belief, see the works of Peter Lindseth, e.g. Peter L Lindseth, 'Reconciling Europe and the Nation-State in Law and History', *Power and Legitimacy: Reconciling Europe and the Nation-State* (OUP 2010).

[15] Chapter 3 Fig 1.

The opportunity for member-state governments to submit legal arguments to the Court is provided by Article 23 of Protocol (No 3) of the Statute of the Court of Justice of the European Union. The provision may originally have been assumed to be a minor detail of court procedure. During the 1960s, nearly half of cases received no legal arguments—written or oral—from national governments. *Van Gend*, arguably the most important decision the Court has ever handed down, received observations from three out of six governments; *Costa*, perhaps the second most important, only from Italy, although the result of the latter case may have been unexpected.[16] But from the mid-1970s, the proportion of cases that received input from national governments began to rise, and by 1994 the UK government was describing it the opportunity to submit observations as 'a valuable and important right.'[17] In the decade up to the end of 2013 more than nine out of ten cases received at least one submission from a Member State; more importantly, in 2013, 69% of all member-state government interactions with the Court of Justice as a whole consisted of submitting observations in preliminary references.[18]

The provisions of Article 23 give national governments a chance to present legal arguments in support of the departments that are parties to the cases referred. Equally, governments may wish to back each other up in support of a favoured implementation of EU legislation or where they perceive a threat to national practices—and finances—from an anticipated decision. But 65% of all submissions in preliminary references are made in cases from other Member States, and their content often addresses issues well beyond the confines of the questions referred. This high level of participation in cases originating in the national courts of other Member States suggests that these submissions to the Court go beyond the defence of national legislation and the protection of national revenue. It seems clear that Article 23 allows all member-state governments to try to influence the evolution of the jurisprudence of the Court above and beyond the outcome of a particular case. In particular, it should give the opportunity for smaller Member States to make their voices heard at the Court and to influence EU law on a level playing-field with the larger and more powerful Member States. Why do some not take the opportunity?

[16] Arguably it should not have been: the doctrine of supremacy had been trailed in *Van Gend*. It was also no coincidence that Mr Costa was himself a lawyer.

[17] Timothy Pratt, 'View from the Member States' in Mats Andenas (ed), *Article 177 References to the European Court: Policy and Practice* (Butterworths 1994) 49.

[18] See Chapter 3 Figure 3 and Appendix B.

Participation rates

The number of governments submitting arguments varies a great deal from case to case, with an average in the period since the 2007 enlargement of 2.5, and a maximum of 13.[19] The highest ever number of government observations received by the Court was 14 from 15 Member States.[20] The nature, in terms of substantive content, of the cases that have received the most government submissions will be returned to later, but most have been 'technical' cases on tax, competition and intellectual property, rather than cases that might be regarded as having immediate constitutional significance.

The wide variation in the take-up of the opportunity to put legal arguments to the Court is a surprising aspect of member-state government behaviour. Some Member States rarely make submissions to the Court in non-national cases. Bulgaria has never done so.[21] Germany, by contrast, has made the most submissions in total but has done so in only 45% of its own cases. The Member States with the highest *rates* of interaction with the Court in the period studied were Poland and the UK, then Austria, the Czech Republic and Germany. The lowest rates are seen with Malta, Luxembourg and Romania—but wealthy Luxembourg makes the most submissions *per head* and second-poorest Romania the fewest. However, rates of interaction with the Court are not merely a function of wealth or size, a point that is strikingly illustrated by comparing pairs of countries. Poland and Sweden, for instance, have similar gross domestic products, but Poland makes nearly three times as many submissions to the Court as Sweden. Finland and Denmark have similar populations, but Finland makes three times as many submissions as Denmark.[22] Nevertheless, small size and lack of wealth do seem to be limiting factors on states' activity at the Court. In addition, other economic factors play a part *indirectly* via their influence on the number of cases referred by national courts: a state's volume of intra-EU trade is an example.

It is important to distinguish between the resources that a Member State has available to it and its reasons for choosing to devote those resources to its legal relationship with the EU. The lack of direct correlation between economic factors and Member States' participation in Court proceedings does not indicate that states' means are irrelevant, but points towards historical and

[19] In joined cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07 *Stoß* EU:C:2010:504, on gambling.

[20] Twice: Case C-44/98 *BASF* EU:C:1999:440; Case C-475/03 *Banca Popolare di Cremona* EU:C:2006:629.

[21] Even in Case C-681/13 *Diageo* EU:C:2015:471, in which the defendant in the national case was a Bulgarian company and the case concerned an allegedly erroneous judgment of a Bulgarian court.

[22] Figures from the World Bank <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD> accessed 31 July 2020.

constitutional factors and political considerations that may affect the investment that countries are willing to make. There is no doubt that governments must be willing to invest considerable resources to put their arguments to the Court. Some Member States make more than fifty submissions a year, each of which involves input from government ministries and their legal advisers and, as was the case with the UK, from independent counsel, all according to a very tight timetable. This requires not just financial but organisational, procedural and judicial resources and the coordination thereof, and represents a considerable commitment on the part of the Member State. Many Member States consider this commitment worthwhile.

The non-economic factors affecting Member States' participation have attracted relatively little attention, perhaps because it is difficult to operationalise them and thus subject them to statistical analysis. Marie-Pierre Granger's comprehensive evaluation is an exception.[23] In this thesis, the economic and non-economic factors affecting the participation of Denmark, Ireland and the UK will be contrasted to demonstrate that their legal and administrative cultures, and attitudes towards the EU, have a strong influence on their participation.

Theories of member-state interaction with the Court of Justice

In order to develop a useful theory of member-state participation at the Court, it is necessary to consider what benefit participation might confer on a Member State and what impact it might have on EU law in general and the Court of Justice in particular. A taxonomy of such influences will be developed in this thesis. It is argued that need for, and usefulness of, such a taxonomy makes it clear that the significance of member-state government interactions with the Court has been both underestimated and oversimplified. In particular, it can be argued that the way in which statistics on member-state government submissions have been operationalised to support competing models of European legal integration fails to account for the Court's legal reasoning.

Classical legal integration models

Intergovernmentalism

In its simplest form, the intergovernmentalist model emphasises the bargains made between the Member States in controlling EU integration and regards legal integration as taking place under the control of member-state governments. The Court of Justice is envisaged as being constrained in its decision-making by the need to find outcomes that are *politically* acceptable to the Member

[23] Marie-Pierre F Granger, 'When Governments Go to Luxembourg ... the Influence of Governments on the Court of Justice' (2004) 29 ELRev 1; Granger (n 9).

States. The Court is not conceived of as an active constitutionalising force but merely as a delegated authority serving the interests of the Member States.[24]

In this context, Carrubba, Gabel and Hankla, among others, argue that a Member State's observations indicate to the Court what judgments its government will accept, and conversely what judgments might result either in the creation of contrary legislation by the member-state governments collectively (legislative override) or in non-compliance by the individual Member State concerned.[25] They operationalise Member States' observations to provide an empirical measure of such constraints on the Court. Meanwhile, neofunctionalists Mattli and Slaughter, and Stone Sweet and Brunell, have challenged their assumptions and methods in a disagreement that enlivened the pages of (particularly) the American Political Science Review for two decades.[26]

Attention should be drawn at this point to one relatively recent model developed by Naurin, Larsson et al. at the University of Gothenburg. They argue that member-state governments do indeed influence the Court's judgments via implied threats of override—if the Member States agree.[27] If, however, the governments' observations indicate substantial disagreement between the Member States, the Court is envisaged as able to proceed with an activist agenda, in the knowledge that the governments would be unable to muster a sufficient majority in the Council to pass blocking legislation.[28]

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[24] Andrew Moravcsik, *Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community*, vol 45 (1991); Geoffrey Garrett, 'International Cooperation and Institutional Choice: The EC's Internal Market' (1992) 46 International Organisation 533.

[25] Clifford J Carrubba, Matthew Gabel and Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 AmPSR 435.

[26] Walter Mattli and Anne-Marie Slaughter, 'Law and Politics in the European Union: A Reply to Garrett' (1995) 49 International Organization 183; Stone Sweet and Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (n 1); Stone Sweet and Brunell, 'The European Court of Justice, State Noncompliance, and the Politics of Override' (n 6); Alec Stone Sweet and Thomas L Brunell, 'How the Legal System of the European Union Works - and Does Not Work: Response to Carrubba, Gabel, and Hankla' (*The Selected Works of Alec Stone Sweet*, 2010) <http://works.bepress.com/alec_stone_sweet/36> accessed 31 July 2020..

[27] Daniel Naurin and others, 'Coding Observations of the Member States and Judgments of the Court of Justice of the EU under the Preliminary Reference Procedure 1997-2008' (2013) University of Gothenburg Centre for European Research Working Paper Series 2013:1 <https://cergu.gu.se/digitalAssets/1438/1438554_2013-1.pdf> accessed 31 July 2020; Olof Larsson and others, 'Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union' (2016) 50 Comparative Political Studies 879.

[28] Olof Larsson, 'Minoritarian Activism: Judicial Politics in the European Union' (PhD Thesis, University of Gothenburg 2015).

Neofunctionalism

The neofunctionalist model, by contrast, sees 'integration through law' as an almost automatic outcome of the Court's role in settling disputes concerning EU law.[29] The concept of neofunctionalism was developed from the 1950s onwards by Haas to explain post-war European integration; it holds that integration is not the achievement of politicians but a natural process resulting from the 'spillover' of benefits from the functional institutions.[30] The term was revived in the 1990s, most notably by Burley and Mattli and by Sandholtz and Stone Sweet, who propose a model of legal integration which is driven by cross-border markets and in which Member States play only a secondary role.[31]

Stone Sweet's model relies upon three elements: cross-border contract-making by individuals; the resolution by the Court of Justice of any disputes that arise concerning the EU legal rules; and the creation of further legal rules by the legislative institutions. Stone Sweet considers that these three elements exist in a dynamic relationship, evolving interdependently and together defining how the EU is constituted. As the number of contracts increases, the legal system becomes more active, and its dispute-resolution functions reduce the risks, and hence the cost, of contracting by settling disputes and increasing legal certainty, thus encouraging more transactions. Judicial law-making widens in scope and thereby encourages further legislation; at the same time, contractors see the need for cross-border rules and policies, putting pressure on both national and supranational legislative bodies to provide them. The combination of greater numbers of transactions and more legislation increases the potential for legal disputes and makes available more grounds for interpretative judicial law-making. The new rules then form the basis of further legislation in what Stone Sweet describes as 'policy feedback'.

Within this model, Member States' observations are conceived of not as an effective mechanism for compelling the Court to comply with the Member States' preferences, but as reactive defences of national practices that have relatively little success in persuading the Court.

If there is one thing that comes out of this academic dispute over different, and in statistical terms somewhat abstruse, analyses of the same dataset, it is that the data support neither an

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[29] Alec Stone Sweet and Thomas L Brunell, 'Constructing a Supranational Constitution', *The Judicial Construction of Europe* (OUP 2004).

[30] Ernst B Haas, *The Uniting of Europe: Political, Social and Economic Forces, 1950-1957* (2nd edn, Stanford University Press 1968).

[31] Burley and Mattli (n 4); Wayne Sandholtz and Alec Stone Sweet, *European Integration and Supranational Governance* (OUP 1998).

intergovernmental nor a neofunctionalist model with any degree of certainty. As noted above, the sheer amount of variation in national behaviour casts doubt on the usefulness of either. In addition, there were (and remain) considerable doubts over whether sufficient is known of the legal arguments contained in member-state submissions to support their operationalisation in this fashion. In many cases, nothing is known at all of what a government said, only that it did so, and the argument devolves to what assumptions might legitimately be made about such submissions. The issue of the availability of the actual contents of member-state governments' observations will be discussed in Chapter 2.

Instead of seeking to decide between these well-hashed positions, this thesis aims to explain what Member States believe they are achieving by submitting written and oral observations to the Court, and what effect their submissions have on the Court. In doing so, it supports a third, 'legalist' perspective on integration that gives more recognition to the legal context within which states' submissions are being made, and provides a taxonomy of the factors that a useful model of the interaction between the Member States and the Court of Justice must take into account.

Threat or dialogue?

Although, as Cramér et al. put it, observations may be intended to 'counsel, guide, or, perhaps, push the CJEU in a desired direction',[32] they are better characterised as a dialogue with the Court than an ultimatum. Not only do many cases turn on technical questions, where the 'threat of legislative override' called for by Carrubba's model is irrelevant, but the members of the Court may positively solicit not just further information but—if it becomes clear that a case is likely to consider significant changes to EU law—Member States' opinions. Even if they are not solicited, states' arguments may be *legally* persuasive. Advocates-General, who unlike the judges are not prevented from exposing their thought processes, may admit to occasionally being swayed by governments' arguments, and the number and sources of member-state submissions may be used to argue the necessity of an Advocate General's Opinion. While it is impossible to be sure that a Member State's legal arguments have influenced the reasoning of the Court unless they are explicitly referred to in the judgment, Member States certainly *believe* their arguments have an influence. There is a plausible suggestion that the Court may be grateful for well-expressed contributions in areas of the law where it lacks expertise. Indeed, governments' pleadings may be the best source of information on the thornier details of national legislation and 'the niceties of

[32] Per Cramér and others, *See You in Luxembourg? EU Governments´ Observations Under the Preliminary Reference Procedure* (Swedish Institute of European Policy Studies 2016).

their legal systems'[33]—not least because the observations are compiled by, or in discussion with, national civil servants. The Court of Justice is, of course, supposed only to rule on the interpretation of EU law, for the national court to apply this ruling to the facts. In practice, a rigid division between the abstract principles contained in the legislation and their application to the facts is difficult to maintain, particularly where a question concerns the effects at the national level of an EU act whose validity is being questioned. In these circumstances, it may be necessary for the Court to find out what these effects are in Member States other than that of the referring court.[34] Thus member-state government observations may affect the Court both at a procedural level and, through their effect on the Court's judgments, in terms of substantive law—and may influence the evolution of EU law as a whole.

From the other side of the dialogue, what do Member States believe they are attempting to achieve by submitting written and oral observations to the Court? It is surprisingly difficult to discover whether governments explicitly weigh up the benefits of intervening. However, their motivation is often explicit or can be deduced, in particular where their observations are not the first airing of their concerns but continue a 'conversation' with the EU that started during the formulation of the legislation concerned. Governments often have a direct interest in the outcome of a case, either because it would affect their revenue or because of the risk of having to redraft national legislation. They may have a prospective interest in the outcome of another Member State's case for similar reasons. Government submissions may be directed towards a narrow question—what tariff should be applied to a product, for instance—or towards refining the principles laid down in a leading case. Their concerns may be broader: conveying their policy preferences in an area of substantive law, blocking a developing line of EU jurisprudence or defending their sovereignty.[35] They may wish to put a political point that is incidental to the referred question.[36] Alternatively, some governments may claim a disinterested desire to help the

[33] Eleanor Sharpston, 'Appendix 5: Written Evidence of Advocate General Sharpston' in European Union Committee, *The Workload of the Court of Justice of the European Union* (HL 2011) para 2.6.

[34] T Koopmans, 'The Technique of the Preliminary Question - a View from the Court of Justice' in Henry G Schermers and others (eds), *Article 177: Experiences and Problems - Asser Institute Colloquium on European Law* (Elsevier 1985) 327, 330.

[35] Francesca Bignami, 'Creating European Rights: National Values and Supranational Interests' (2005) 11 Colum J Eur L 241, 280.

[36] E.g. Case C-370/12 *Pringle* EU:C:2012:756, in which, although the case hinged on whether there had been improper use of the simplified revision procedure, the UK wanted to emphasise that the procedure could be used for reducing EU competences, but not increasing them.

Court extract the 'right' question from a muddled referral or to identify the wider considerations that may arise from a question that is ostensibly straightforward on its facts.[37]

It can be argued that this is a genuine dialogue between governments and the Court. It is not merely concerned with the exposition of national law but may be an important mechanism for conveying Member States' policy preferences to the EU, both in terms of substantive law and in terms of the evolution of EU law as a whole.

Dialogue or discourse?

This dialogue with the Court should not be looked at in isolation, but as one aspect of a wider discourse between the Member States and the EU with both political and legal aspects—what Wincott calls 'the everyday grind of the Community.'[38] Member States participate on a day-to-day basis in many processes of EU decision-making, from the most official, such as voting in the Council of the European Union, through the prior preparations by the Committee of Permanent Representatives (COREPER) and other involvement in the administrative functions of the EU such as training, soft law and preparing national position papers, to informal 'corridor bargaining'[39] and lobbying the Commission during the fine-tuning of legislation that has already been approved by the Council and Parliament. The submission of legal arguments to the Court should be regarded as part of this continuum of interaction between governments and the EU.

Once member-state participation in court proceedings is thought of as part of a wider discourse between the Member States and the EU, it becomes clear that models that regard the legal arguments as a simple 'threat of non-compliance' are, at the very least, over-simplified. The discourse is ongoing and takes place at several levels.

Conceptual framework for discourse

This discourse has been characterised in several different ways. This thesis picks out two conceptual frameworks in order to discuss member-state governments' interaction with EU law: first, the characterisation of this interaction by Weiler as the manifestation of 'Voice'[40] and

[37] A process described by a retired Advocate General as 'doing the Court's homework'.

[38] Daniel Wincott, 'Institutional Interaction and European Integration: Towards an Everyday Critique of Liberal Intergovernmentalism' (1995) 33 J Com Mar St 597, 603.

[39] Fiona Hayes-Renshaw and Helen S Wallace, *The Council of Ministers* (2nd edn, Palgrave Macmillan 2006) 6.

[40] Joseph HH Weiler, *The Constitution of Europe - 'Do the New Clothes Have an Emperor?' And Other Essays on European Integration* (CUP 1999).

second, its characterisation by Schmidt as a context for the 'uploading' of national policies to the EU and the 'downloading' of legislation and legal decisions by the Member States. It can be argued that they are not as much rival models as models that are useful in different contexts, and they can be reconciled into a more nuanced description of the relationship between the EU and its Member States. They are, however, discussed separately in Chapter 7.

In the context of European law, Exit and Voice describe a Member State's choice of whether, when faced with an unwelcome rule, to use persuasion to change the rule from within (Voice) or to employ selective Exit—choosing either not to implement, or not to enforce, EU law.[41] It will be suggested that any legal actions that result from selective Exit give a Member State a last opportunity for Voice, and that this might act as a kind of safety-valve for national governments, tempering the Court's perceived threat to their national sovereignty.

Another way of addressing the discourse between the EU and the Member States is to borrow terminology from Europeanisation theory. The processes of transnational EU policy-making involve flows of information about policy preferences between Member States and the institutions of the European Union, which can be described as 'uploading' (to the EU level) and 'downloading' (by a Member State). The uploading model employs somewhat less apocalyptic concepts than Exit and Voice and can be argued to fit the technical, mundane nature of much of the Court's business more comfortably. In the context of member-state government interactions with the Court, uploading is the more important process, and this thesis will consider some reasons why states differ in their enthusiasm and capacity for uploading. But under this model, too, participating in court cases seems to give the Member States the opportunity for a last word.

What can be learnt from the discourse?

It will be argued in Chapter 7 that what Member States submit in court cases might, in principle, convey more about their policy preferences than can be learnt from looking at their voting behaviour in Council. The only information that is generally available about Council proceedings is the voting results and any accompanying statements, and these may convey less about member-state policy preferences than would at first appear. There are several reasons for this. Firstly, the majority of votes in Council are unanimous, despite the unlikelihood of complete accord among the Member States. How a Member State votes in the Council does not necessarily indicate its true preferences but may be the outcome of considerable prior bargaining and negotiation

[41] Weiler (n 4) 2412–20.

between Member States in a setting that values consensus.[42] By contrast, it can be argued that Member States' submissions to the Court are less likely to be the outcome of inter-state political bargaining. Secondly, even when a Member State does vote against the majority, it may not give a public statement of its reasons, although common sense may supply the explanation. Thirdly, records of Council votes are only publicly searchable from 1999 onwards, and voting results on some important measures seem to be omitted. Nevertheless, it should be feasible to demonstrate this discourse by looking at a Member State's known position at the Council (which realistically would have to be evidenced by a vote against a measure) and linking it with subsequent submissions to the Court.

Unfortunately, this raises the existence of a problem with both practical and normative implications. The content of member-state government submissions cannot be accessed directly but can only be deduced from the Reports for the Hearing (if any) or the Advocate General's Opinion (also if any) or, rarely, from the Court's published judgment. The information exists, because it was committed to paper and often expanded upon in an oral hearing, but it is available, at best, in summary. Thus the general propositions made here about the use that can be made of member-state governments' legal arguments must be read subject to the proviso that their content may be obtainable only in outline, or occasionally not at all. Nevertheless, despite the difficulty of finding out the contents of governments' submissions to the Court, the information is still more accessible than Member States' arguing positions in the Council and therefore a resource that should not be neglected.

It will be argued that a member-state government's approach to contributing to Court proceedings is an indirect reflection both of its policy preferences and of its attitude to EU law. By allowing member-state governments to present legal arguments to the Court, the Court is being asked to consider not just questions of law but of policy, and questions that shade into politics. As Bengoetxea, MacCormick and Moral Soriano have pointed out, the Court has been criticised as 'crossing the line between the legal and political' but, they argue, there is no line, but 'an area in which law and policies overlap', which the Court must manage.[43] Similarly, Weiler says that

[42] Mikko Mattila, 'Voting and Coalitions in the Council after the Enlargement' in Daniel Naurin and Helen Wallace (eds), *Unveiling the Council of the European Union - Games Governments Play in Brussels* (Palgrave Macmillan 2008).

[43] Joxerramon Bengoetxea, Neil MacCormick and Leonor Moral Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in Gráinne de Búrca and Joseph HH Weiler (eds), *The European Court of Justice* (OUP 2001) 43.

'[T]he very dichotomy of law and politics is questionable.'[44] This 'minor detail of court procedure' presents a microcosm of the overlap.

It is proposed, therefore, that the behaviour of governments before the Court of Justice cannot be understood in isolation from their relationship with the processes of EU law as a whole. This proposal can usefully be examined by comparing and contrasting Denmark, Ireland and the UK: three Member State that—despite having joined at the same date—have (or had) different constitutional models, sizes and levels of participation in EU affairs.

The structure of the thesis

This thesis will proceed as follows. Chapter 2 introduces the procedural provisions that enable member-state governments to present legal arguments to the Court of Justice, describes and evaluates the various sources from which these legal arguments can be obtained, and explains how the research database was compiled. Chapter 3 discusses what the database reveals about the differences between the Member States in terms of their readiness to submit observations in proceedings at the Court of Justice. Chapter 4 presents a taxonomy of how the Court of Justice uses member-state governments' observations, and Chapter 5 a taxonomy of the reasons the Member States may have for submitting observations. Chapter 6 reviews these reasons with reference to Denmark, Ireland and the UK, drawing attention to the differences between them that affect their readiness to make submissions to the Court. Chapter 7 argues that Member States' submissions to the Court of Justice form part of a wider discourse with EU law that includes states' voting behaviour at the Council of the European Union. It describes two models of this discourse and suggests that states' observations to the Court are a better reflection of their policy preferences than are their votes. The thesis concludes that theoretical models of the interaction between the Member States and the Court of Justice must be able to account for the variation between the Member States and for both Member States' motives for submitting observations and the benefits of those submissions to the Court.

Terminology

In general, Treaty provisions have been numbered according to the system in operation at the relevant date. However, as the preliminary reference procedure is the subject of this thesis, it has been designated Article 267 TFEU throughout for the sake of clarity. Similarly, what is now the

[44] Weiler (n 4) 2409.

European Union is described thus other than where its historical status as the European Economic Community or the European Community is relevant to the discussion.

Brexit

The research for this thesis started before the UK's referendum on EU membership. While the UK is one of the case studies, the cut-off point of the study is 31 December 2013 and Brexit is consequently not discussed, although its effect on the Court of Justice's jurisprudence will be an intriguing topic in the future. Therefore, the only concession to Brexit has been the recasting of references to the UK's interactions with the Court in the past tense where necessary.

Chapter 2: Sources and Methods

The Preliminary Reference Procedure

This thesis considers what benefits accrue to the Member States and the Court of Justice from governments' participation in preliminary reference cases, plus the reasons why the participation rate varies between the Member States. A full analysis requires both statistical information on the *number* of observations submitted by each Member State and information about the *contents* of the submissions. In order to appreciate how the Member States can participate in the preliminary reference procedure, and to recognise the stages from which information about Member States' submissions can be drawn, it is first necessary to examine the procedure in detail.

This chapter describes the provisions that enable the Member States to submit legal arguments to the Court in preliminary reference cases. The Court's procedures are examined to discover where they give rise to documentary evidence of these arguments, and the method by which information can be extracted from each source is described and critiqued in terms of its practicality. The chapter concludes with a description of the coding method used to create the database of member-state government observations.

Procedure in preliminary reference cases

This section outlines the procedure followed in typical preliminary reference cases. There are separate expedited procedures for use when the nature of a case requires that the Court deal with an issue within a short time or when a case raises questions in the Area of Freedom, Security and Justice.[1] Such expedited cases are included in the database of coded cases.[2]

The written procedure

The opportunity for states to submit *written* legal arguments in preliminary reference cases is provided by Article 23 of Protocol (No 3) on the Statute of the Court of Justice of the European Union.

[1] Rules of Procedure of the Court of Justice of 25 September 2012 [2012] OJ L265/1, as amended on 18 June 2013 [2013] OJ L173/65, Articles 105 to 114 <http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf> accessed 31 July 2020.

[2] 10 cases under Article 104a of the Rules of Procedure and 16 cases under Article 107.

Article 23

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court of Justice shall be notified to the Court by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Court to the parties, to the Commission and to the Member States, and to the institution, body, office or agency of the Union which adopted the act the validity or interpretation of which is in dispute.

Within two months of this notification, the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court.

Similar provisions apply to notifying the members of the European Free Trade Association (EFTA).[3] Thus the parties, the Member States, the relevant institutions, the EFTA states and the EFTA Surveillance Authority are given two months to submit written observations to the Court if they so wish. External countries may also submit written observations in cases concerning certain treaties.[4]

The only body that always submits written observations in preliminary reference proceedings is the Commission.[5] The Council usually submits observations if one of its own legal acts has given rise to the question referred or is likely to be affected, and where international agreements are involved or where a case has international implications. It also occasionally does so in cases that are likely to have a high profile and attract many observations from the Member States.[6] The Parliament almost invariably submits written observations if the validity of one of its legal acts is under consideration. Indeed, Rule 141 of the Parliament's Rules of Procedure says: 'If the Conference of Presidents takes the view that Parliament should, exceptionally, not submit observations or intervene before the Court of Justice of the European Union where the legal

[3] European Free Trade Association (EFTA) members are Iceland, Liechtenstein, Norway and Switzerland.

[4] In the only cases of which I am aware, the non-EU government was a party: C-428/08 *Monsanto v Cefetra* and C-154/11 *Mahamdia v Algeria*.

[5] From the 2007 enlargement to the end of 2013, only 7.5% of cases attracted no written observations from states; the average number of written observations from all sources was 3.6.

[6] E.g. Case C-403/08 *Football Association Premier League* EU:C:2011:631; Case C-366/10 *Air Transport Association of America* EU:C:2011:864.

validity of an act of Parliament is being questioned, the matter shall be submitted to plenary without delay'.[7] It rarely does so in other cases.[8] The EFTA Surveillance Authority submits observations where the EEA Agreement is concerned or where issues are likely to come up before the EFTA Court.[9] However, over two-thirds of observations come from Member States, about a third in cases originating in their national courts and two-thirds in those of other Member States.[10]

There is no formal requirement as to the structure or content of written observations. They can vary in length from half a side of A4 to a substantial brochure, such as the UK submitted in *CD*, and may include annexes and expert reports.[11] Member States do not have to address all the questions referred and may announce at the beginning of their observations that they are only going to address a single issue. The written observations (but not usually the annexes) are translated into the language of the Court, French, and circulated amongst the parties, institutions and states. It is possible for those who did not receive another party's annexes to request them or to consult them at the Court Registry. In *Danske Svineproducenter*, an attempt to have the oral procedure reopened, on the basis of the non-receipt of annexes, failed.[12] There is no opportunity for the recipients to respond to each other's observations with a second round of written observations; instead, any response has to be reserved for oral argument at the hearing, if any. Any party that would have been entitled to submit written observations, but did not do so, retains the right to present oral argument at the hearing.

After the written procedure

After the written part of the procedure is closed, the Judge-Rapporteur assigned to the case composes a Preliminary Report,[13] which is discussed at a general meeting of the members of the

[7] Emphasis added.

[8] A tentative example is *Heinrich*, where both the Council and Parliament submitted written observations in a case on whether an unpublished annexe to a European Parliament and Council Regulation could have binding force (Case C-345/06 *Heinrich* EU:C:2009:140).

[9] See discussion of Case C-42/02 *Lindman* EU:C:2003:613 in Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (OUP 2014) 348.

[10] It is not unusual for a Member State makes oral observations at the hearing without having previously submitted written observations; this cannot always be determined from the published data.

[11] German submission in Case C-377/14 *Radlinger and Radlingerová* EU:C:2016:283; Case C-167/12 *CD v ST* EU:C:2014:169.

[12] Case C-491/06 *Danske Svineproducenter* EU:C:2008:263, para 25.

[13] In the language of the Court, *rapport préalable*.

Court.[14] The Preliminary Report considers whether further information is needed from any of the bodies that are entitled to submit written observations. If so, the Court issues a request for more details, which may be directed at the referring court or a member-state government.[15]

The preliminary report is an internal document, and because it contains not just recommendations about procedural issues but the Judge-Rapporteur's identification of the key legal issues and some thoughts on their resolution,[16] falls within the exemptions to the institutions' transparency rules provided by Article 4(3) of Regulation 1049/2001. This states:

> Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.[17]

The two most important decisions made at this point are whether the Advocate General should give an Opinion and whether there should be an oral hearing. The Judge-Rapporteur makes proposals on these decisions, in consultation with the Advocate General, after they have read the case materials.[18] The Judge-Rapporteur's recommendations are then presented to the general meeting. These are not invariably followed.

Should there be an oral hearing?

Initially, there was an oral hearing in almost every case that did not result in a Reasoned Order.[19] The proportion of cases in which there was an oral hearing decreased substantially when the Court altered its working procedures in anticipation of an increased workload after the 2005

[14] Articles 59 and 25 of the Rules of Procedure (n 1).

[15] E.g. in Case C-250/92 *Gøttrup-Klim* EU:C:1994:413, para 19.

[16] Alberto Alemanno and Oana Stefan, 'Openness at the Court of Justice of the European Union: Toppling a Taboo' (2014) 51 CML Rev 97, 131.

[17] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.

[18] Usually after all the documents have been translated into French, unless the Judge-Rapporteur is familiar with the language of the case.

[19] A preliminary reference may be answered by a Reasoned Order, in accordance with Article 99 of the Rules of Procedure (n 1), where a question is identical to one on which the Court has already ruled or where the answer may be clearly deduced from existing case-law or admits of no reasonable doubt – see C-580/14 *Bitter* EU:C:2015:835.

enlargement: for instance, in 2012, nearly one-third of preliminary reference cases proceeded to judgment without an oral hearing.[20] The Rules of Procedure provide as follows:

> Article 76
>
> …
>
> 2. On a proposal from the Judge-Rapporteur and after hearing the Advocate General, the Court may decide not to hold a hearing if it considers, on reading the written pleadings or observations lodged during the written part of the procedure, that it has sufficient information to give a ruling.
>
> 3. The preceding paragraph shall not apply where a request for a hearing, stating reasons, has been submitted by an interested person referred to in Article 23 of the Statute who did not participate in the written part of the procedure.

The opportunity to present oral argument without having previously submitted written observations is essential because Member States (and others) may only become aware of the legal implications of a case once they have read others' observations. This situation is not rare: in 2012, Member States presented *only* oral argument in around a tenth of the cases where there was a hearing.[21] Equally, parties that did present written submissions may wish to respond to points made by others, either in support or disagreement. According to the Court's Notes for the Guidance of Counsel, the oral procedure should be used to:

- allow the parties and other interested persons to reply to the arguments put forward by other participants in their written pleadings
- provide a more detailed analysis of the dispute, by clarifying and expounding the points which are most important for the Court's decision
- answer any specific questions put by the Court and respond to any requests made for the oral submissions to concentrate on particular issues
- submit any new arguments prompted by recent events occurring after the close of the written procedure.[22]

[20] 83 of 267 cases.

[21] In 2012, of the 127 cases for which the information can be obtained from the Advocate General's Opinion, 16 had a submission from a Member State that had not submitted written observations.

[22] Registry of the Court of Justice of the European Communities, *Notes for the Guidance of Counsel* (Court of Justice of the European Communities 2009) 23.

The Notes also point out that 'the oral procedure must, however, involve no repetition of what has already been stated in writing. Participants at the hearing who have the same arguments to make should, where at all possible, avoid repeating points that have already been put forward at the same hearing.' There are two reasons: first, because each oral submission is limited to twenty minutes,[23] and second, to avoid irritating the judges, who are presumed to be familiar with the contents of the written observations. Counsel may be—and often are—cut short if they start to repeat points made previously. Notionally, therefore, the content of oral submissions is new and may be as important as the written observations.

In certain circumstances, a second oral hearing may be held. The Court may do so of its own account where, for instance, it feels that it lacks information, or new information has become available, or it considers that the case should be heard by a different formation of the Court. Officially, this may occur at the behest of an interested party, 'where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons.'[24]

In fact, most requests for the reopening of the oral procedure are because an interested party disagrees with the contents of the Advocate General's Opinion. No such request has been entertained by the Court, which invariably replies with what has been described as a 'cut-and-paste' refusal.[25] Following the failure of an attempt to reopen the hearing in *Emesa Sugar*,[26] Emesa attempted to bring a case before the European Court of Human Rights on the basis that its right to a fair trial had been violated by the Court's refusal to allow it to submit written observations on the Advocate General's Opinion.[27] Perhaps unfortunately—for this is an intriguing question—the case was ruled inadmissible on the basis that the national case did not raise an issue of human rights.[28] Tridimas contends that '[T]he fact that the litigants may not

[23] 15 minutes in cases dealt with by chambers of three judges: see Broberg and Fenger (n 9) 4.4.3.

[24] Article 83 of the Rules of Procedure (n 1).

[25] Aidan O'Neill, *EU Law for EU Lawyers* (2nd edn, Bloomsbury 2011) 2039. See e.g. Joined cases C-544/03 and C-545/03 *Mobistar* EU:C:2005:518, paras 22-25; Case C-312/14 *Banif Plus Bank* EU:C:2015:794 paras 27-34.

[26] Order of the Court in Case C-17/98 *Emesa Sugar* EU:C:2000:69, which contains a thoughtful discussion of the role of the Advocate General at paras 10-15.

[27] Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[28] *Emesa Sugar v Netherlands* App no 62023/00 (ECtHR, 13 January 2005); see also *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij v Netherlands* App no 13645/05 (ECtHR, 5 February 2009).

submit observations on the opinion is no more of a threat to the right to judicial protection than the fact that the litigants have no right of appeal against the judgment of the Court itself.'[29] The fact that preliminary reference proceedings are—in principle—not contentious may invalidate the latter point. However, it does not invalidate concerns over the possibility of a misunderstanding by an Advocate General going unchallenged.[30] Clearly, the Court is alerted to the possibility of such a misunderstanding by the application to reopen the hearing, even if the request is refused; nevertheless, it could be argued that the purpose of Member States' observations demands such a clarification. However, the Court has not infrequently reopened the oral procedure on its own account.

One consequence of the holding of an oral hearing used to be that more information was publically available about the content of the *written* observations. Until November 2012,[31] the Judge-Rapporteur would write a Report for the Hearing, which summarised the arguments in the written observations. The report was prepared in French, translated into the language of the case,[32] and circulated to the parties entitled to present observations. Unfortunately, this useful document was abolished despite last-ditch attempts to save it by, among others, the Law Society of England and Wales,[33] and despite grumbling by academics and the European Parliament. The Parliament, partly because its MEPs have themselves been denied access to documents of the other institutions[34] has become 'the most significant institutional proponent of transparency.'[35] The Court acknowledges that the parties lack 'written assurance that the reporting judge has correctly understood the factual and legal framework and the substance of their pleadings' but argues that the 'inconvenience' is offset by speedier proceedings.[36] The Parliament recommended reinstatement of the Reports, transparency in respect of written submissions to the Court and the

[29] Takis Tridimas, 'The Role of the Advocate General In the Development of Community Law: Some Reflections' (1997) 34 CML Rev 1349, 1382.

[30] See Noreen Burrows and Rosa Greaves, *The Advocate General and EC Law* (OUP 2007) ch 3.

[31] Rules of Procedure (n 1).

[32] Until the end of 1993, Reports for the Hearing were also translated into English and included in the published Court Reports.

[33] Law Society of England and Wales, 'Reforms to the Court of Justice of the European Union: Position of the Law Society of England and Wales' (2011) 4.

[34] See e.g. Case C-353/99 P *Council v Hautala* EU:C:2001:661; Quentin Ariès, 'MEPs Launch Legal Challenge on Access to Documents: Left-Wing Group Says Commission Is Withholding Documents on Tax Deals' *Politico Europe Edition Online* (14 January 2016); Francesca Bignami, 'Creating European Rights: National Values and Supranational Interests' (2005) 11 Colum J Eur L 241, 308.

[35] Bignami (n 34) 303.

[36] Niilo Jääskinen, 'Through Difficulties towards New Difficulties – Wandering in the European Judicial Landscape' (King's College Annual European Law Lecture, London, 15 February 2013).

extension of the current electronic filing system to allow registered third persons online access to court files.[37] This recommendation has not been followed.[38]

Should there be an Advocate General's Opinion?

As noted above, the Judge-Rapporteur's preliminary report may also contain a proposal to dispense with an Opinion of the Advocate General if the case is considered not to raise any new point of law.[39] This became a possibility after the Treaty of Nice of 2001,[40] after which the proportion of judgments delivered without an Opinion increased from 30% in 2004 to 48% in 2013.[41] Moving to judgment without an Opinion represents a saving in time and resources for both the Court and the parties that are awaiting a resolution of their case at the national level.[42] The expediency may, however, need to be balanced against a decrease in the comprehensibility of judgments. This matters not only to an academic audience and the public, but to those who need to implement the Court's decisions,[43] to courts referring subsequent cases on similar subjects, and to interested parties making observations in related cases.[44] It also removes a reliable source of information on the legal arguments submitted to the Court.

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[37] Vesna Naglič, *National Practices with Regard to the Accessibility of Court Documents* (European Parliament 2013) 6.2.2.1; European Parliament Committee on Civil Liberties Justice and Home Affairs, 'Draft Report on Public Access to Documents (Rule 116(7)) in 2014 and 2015' (2015) 2287.

[38] For the period from 1951 to 1978, the pleadings in both direct actions and preliminary references can be consulted at the Historical Archives of the EU in Florence.

[39] Article 20 of Protocol (No 3) on the Statute of the Court of Justice of the European Union, para 5.

[40] Article 20 of the Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [2000] OJ C80/1.

[41] Court of Justice of the European Union Annual Report (2004) 13 <http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/cj2004_2008-09-30_10-29-51_891.pdf> accessed 31 July 2020; Court of Justice of the European Union Annual Report (2013) 10 <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdag14001enc.pdf> accessed 31 July 2020.

[42] An experiment in not publishing Opinions in 2008 was greeted with dismay and was rapidly abandoned: Alicia Hinarejos, 'Social Legitimacy and the Court of Justice of the EU Some Reflections on the Role of the Advocate General' [2012] CYELS fn 65.

[43] Eleanor Sharpston, 'Appendix 5: Written Evidence of Advocate General Sharpston' in European Union Committee (ed), *The Workload of the Court of Justice of the European Union* 1.8; *HMRC v Aimia Coalition Loyalty* [2013] UKSC 15 paras 87 and 129.

[44] Michal Bobek, 'Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice' (2008) 45 CML Rev 1611, 1639.

After the oral hearing

The Opinion is delivered, on average, two months after the oral hearing.[45] Technically it forms the final part of the oral procedure, as the Advocate General does not take part in the Court's subsequent deliberations.[46] Each judge who participated in the hearing states his or her view and the reasons for it. The Court then makes its judgment based on the 'conclusions reached by the majority of the Judges after final discussion.'[47] This terse specification does not mean that there may not be extensive discussion of the legal issues: as Edward says:

> Quite frequently, the parties to the proceedings before the referring court do not submit written observations or take part in the oral procedure, and the member states which might have most to contribute do not intervene ... Consequently, it may only be at the stage of deliberation that the points of view of a number of lawyers with different perspectives are brought to bear in identifying the issues and possible solutions.[48]

If their contribution is mentioned in the judgment, this represents the final opportunity to discover what legal arguments these lawyers made to the Court. However, as Article 32 of the Rules of Procedure states, '[t]he deliberations of the Court shall be and shall remain secret.' The judgment is collegiate, and no dissenting or differently reasoned views are disclosed; similarly, much of the legal discussion to be found in the Opinion may fall by the wayside. Lasser observes that 'ECJ judgments remain not only collegial and unsigned, but also relatively terse and condensed: the vast majority run to only three to four pages in length, despite the often dazzling procedural complexity of the cases', leading the judgments to 'deny access to the finer points of their interpretative and normative decisions'. While the brevity of the judgments has relaxed somewhat over the years, Lasser's comment indicates that their format is too restrictive to convey the details of the legal arguments presented to the Court.[49]

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[45] Broberg and Fenger (n 9) 385.

[46] Article 82 of the Rules of Procedure (n 1).

[47] Article 32 of the Rules of Procedure (n 1).

[48] David Edward, 'Reform of Article 234 Procedure: The Limits of the Possible' in David O'Keeffe and Antonio Bavasso (eds), *Judicial Review in European Union Law, Vol 1*, vol 1 (Kluwer Law International 2000).

[49] Mitchel de S O-l'E Lasser, 'The European Union: Discursive Bifurcation Revisited', *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (OUP 2009) 318.

Published information

The Advocates General's Opinion and the text of the judgment are made available in electronic form on the day they are delivered. The original judgment is deposited at the Registry of the Court, and certified copies are served on the parties, the referring court or tribunal and the interested persons referred to in Article 23 of the Statute.[50] Various print and electronic forms follow, including a notice containing the date and the operative part of the judgment, in print and electronic form, in the Official Journal of the European Union;[51] and on the European Union's database of legal texts, EUR-Lex[52] and the Court's website.[53] The latter includes biographical data about each case, including the sources of any observations.

An evaluation of the sources of information on observations offered by the preliminary reference procedure

The procedure before the Court of Justice discloses six potential sources of information about observations submitted to the Court of Justice.

1. The number and source of observations submitted to the Court are listed among the biographical data attached to each case in the Curia and EUR-Lex databases. However, it is not specified whether these were written briefs, oral arguments before the Court, or both.
2. The Reports for the Hearing that were distributed before each hearing included a summary of the written arguments. Up to 1993, they were published with the case reports. Between 1993 and 2012 they were not made generally available, although Reports from this period may be consulted at the Court's library. From 2013 onwards, no Reports were prepared.
3. The position of the Court is that '[t]he current practice of the Court is to treat all documents lodged by parties as strictly confidential; such documents are never disclosed to third parties.'[54] The pleadings may, however, be disclosed by the parties themselves;[55]

[50] Article 88 of the Rules of Procedure (n 1).

[51] Article 92 of the Rules of Procedure (n 1); up to 30 June 2013 the print edition of the Official Journal is the authentic document that produces legal effects; thereafter the electronic version is authentic.

[52] <http://eur-lex.europa.eu/> accessed 31 July 2020; since September 2011, it has been possible for chambers sitting with three or five judges to decide, exceptionally, not to publish a judgment on a request for a preliminary ruling: see <http://eur-lex.europa.eu/collection/eu-law/eu-case-law/reports.html> accessed 31 July 2020.

[53] <http://curia.europa.eu/juris/recherche.jsf?language=en> accessed 31 July 2020.

[54] Email from Lynn Hewlett of the Registry of the Court of Justice to author (4 March 2013).

in the case of member-state governments, this is likely to be in response to a freedom of information request. These pleadings may then be released into the public domain.[56]

4. Advocate Generals' Opinions frequently summarise the positions of the participating states on the legal issues under consideration. However, they do not invariably do so, nor do they necessarily analyse each Member State's arguments in detail.
5. In principle, the institutions of the EU may be required to give access to their own pleadings under the rules on access to documents, namely Article 15(3) TFEU and Regulation 1049/2001.[57] The Court endorsed this requirement in *API*[58] but has emphasised that in its *own* case, the requirement only applies to its administrative functions,[59] and 'does not apply to documents concerning cases'.[60]
6. The oral arguments (which often reiterate the written pleas despite the Court's disapproval of this practice) are given in open court[61] and can be noted down, although not recorded, by anyone attending the hearing.[62]

Each of these sources will now be evaluated in terms of what information it *potentially* offers, how this might be extracted, and its limitations.

1. The biographical data

Biographical data on each case are published on EUR-Lex.

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[55] Notably in Case C-370/12 *Pringle* EU:C:2012:756 <https://www.asktheeu.org/en/request/5598/response/18154/attach/2/Obs%20ecrites%20THOMAS%20PRINGLE%20EN%20Redacted.pdf > accessed 31 July 2020 and Case C-362/14 *Schrems* EU:C:2015:650 <www.europe-v-facebook.org/CJEU_subs.pdfa> accessed 31 July 2020; see also Case C-376/98 *Germany v Parliament and Council* EU:C:2000:181.

[56] For instance, the observations in *Gambazzi* (Case C-394/07 *Gambazzi* EU:C:2009:219) were released to researcher Marta Requejo and published online: < http://conflictoflaws.net/2009/the-written-observations-submitted-in-the-gambazzi-case/> accessed 31 July 2020.

[57] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.

[58] Case C-514/07 P *Sweden v API and Commission* EU:C:2010:541, paras 131-134.

[59] Decision of the Court of Justice of the European Union of 11 December 2012 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions [2013] OJ C 38/02.

[60] Court of Justice website, 'Access to Documents' < http://curia.europa.eu/jcms/jcms/P_92910/> accessed 31 July 2020.

[61] The Court of Justice can close a hearing 'for serious reasons' (Article 31 of Protocol (No 3) on the Statute of the Court of Justice of the European Union).

[62] The Court's judicial calendar is published online: < http://curia.europa.eu/jcms/jcms/Jo2_17661> accessed 31 July 2020.

Limitations

The overwhelming limitation of this source of information is that the biographical data for each case record only that a Member State submitted observations, not their content.

2. Reports for the Hearing

Until 1 November 2012, the judge *rapporteur* prepared a Report for the Hearing which contained a summary of the written observations. For cases up to 1993, this was published in the case reports of the Court. From 1993 to 2012, Reports for the Hearing were only made for internal use, in the language of the case plus French. Theoretically, these Reports may be obtained from the Registry for individual cases.[63] Fortunately, there was nothing to prevent those present at the hearing, or who otherwise received copies of Reports, from copying and distributing them. Sweden's Ministry of Foreign Affairs systematically archived Reports for the Hearing and has made those from 1997 to 2008 available for a project undertaken by the Centre for European Research at the University of Gothenburg (CERGU), entitled *The European Court of Justice as a political actor and arena: Analysing member states' observations under the preliminary reference procedure*. The first results from this project were presented at a conference in May 2013, and they include valuable information on member-state observations.[64] The terms under which the information was released forbade it from being placed online or distributed outside the research team, but I was able to spend two weeks at CERGU as a visiting researcher in 2013 and make use of the material.

Although in most cases the information contained in a Report for the Hearing is the best one can get, it may be no more than an outline of the Member States' positions. However, it may sometimes contain much more: for instance, in Case C-192/99 *Kaur* the Report for the Hearing devotes eleven pages to the arguments of the five Member States that submitted observations, as compared with two paragraphs in Advocate General Léger's Opinion.[65]

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[63] Experience does not reveal a high success rate with such requests, however.

[64] Olof Larsson and Daniel Naurin, 'Legislative Override of Constitutional Courts : The Case of the European Union' [2013] European Union Studies Association International Biennial Conference; Daniel Naurin, Per Cramér, Olof Larsson, Sara Lyons, Andreas Moberg and Allison Östlund, 'Coding observations of the Member States and judgments of the Court of Justice of the EU under the preliminary reference procedure 1997-2008 Data report' (2013) CERGU Working Paper Series 2013:1 <http://cergu.gu.se/digitalAssets/1438/1438554_2013-1.pdf> accessed 31 July 2020.

[65] Case C-192/99 *Kaur* EU:C:2000:602, Opinion of AG Léger paras 19 and 35.

Limitations

The chief limitation of Reports for the Hearing as a source of information is the difficulty of access to Reports after 1992, and their abolition at the end of 2012. Where Reports can be accessed, they reveal inconsistencies in the reporting of Member States' positions—which, admittedly, vary in length and complexity themselves. At their best, Reports can contain detailed analysis of the legal arguments.

3. Pleadings released by the parties

These are the ideal source of information, limited only by the fact that they are unlikely to have been translated from the language of the case.[66] As occurred in *Schrems* and *Pringle*, the instigators of some politicised cases may be highly motivated to release their arguments to the public.[67] In other cases, governments may respond positively to freedom of information requests as the UK did in, for instance, Cases C-394/07 *Gambazzi* and C-521/12 *Briels*.[68] The Information Commissioner's Office (ICO) has, however, made it clear (concerning a request to the Department for Work and Pensions for the UK's observations in Case C-67/14 *Alimanovic*[69]) that pleadings fall within an exemption in the Freedom of Information Act covering information 'held only by virtue of being contained in any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter.'[70] The ICO argued that a previous decision by another public authority not to rely on the exemption did not fetter the Commissioner or the DWP.[71] The Irish government has likewise refused an attempt to gain access to its submissions via the Irish Freedom of Information Act.[72]

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[66] The translations (and notably the arithmetic in financial cases) may not be faultless.

[67] See n 55 above.

[68] Case C-394/07 *Gambazzi* EU:C:2009:219, <http://conflictoflaws.net/News/2009/11/UK-Written-Observations_P1.pdf> accessed 31 July 2020; Case C-521/12 *Briels* EU:C:2014:330, <https://www.gov.uk/government/publications/uk-submissions-to-the-briels-case> accessed 31 July 2020.

[69] Case C-67/14 *Alimanovic* EU:C:2015:597.

[70] Freedom of Information Act 2000, s 32(1)(a).

[71] <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1623740/fs_50587685.pdf> accessed 31 July 2020.

[72] Elaine Fahey, 'On the Assessment of the Operation of EU Law in the Irish Courts since Accession (UACES Conference, 40 Years since the First Enlargement, London, 7-8 March 2013) <https://www.uaces.org/archive/papers/abstract.php?paper_id=683> accessed 11 August 2020.

Limitations

The chief limitations of this source of information are rarity and inconsistency. Observations may be released privately to researchers or put in the public domain via the internet, but they are extremely thin on the ground, and in the latter case, the lack of consistency in their description makes them elusive. As noted above, politically motivated parties may advertise their arguments as part of a process of strategic litigation and in order to stimulate debate: an example is the data privacy activist Max Schrems. Where companies are parties, there can be assumed to be a commercial disincentive to their releasing documents that may expose a company's workings to scrutiny. Governments as litigants do not share (or, frequently, have) policies on the release of their arguments and even within a Member State the inconsistent approach by different departments demonstrates a lack of legal certainty.

4. The Advocate General's Opinion

The Advocate General's Opinion is the most significant source of information on the legal arguments applicable to a case, as well as what may be the only discussion of legal doctrine. Advocates General make 'reasoned submissions': careful and detailed arguments for the solutions they wish to put forward to the Court.[73] The more complex and doctrine-heavy the case, the more the Advocate General might be expected to grapple *explicitly* with conflicting arguments from the interested parties. Lasser draws attention to Advocate General Mischo's Opinion in *Francovich*, in which he assessed the member-state governments' and the Commission's arguments and even distinguished the pleadings put forward at the oral hearing from those given in written observations.[74] However, the amount of information about the interested parties' legal arguments differs from case to case, and from Advocate General to Advocate General, the 'formal freedom' of Opinions affording scope for a degree of individual variation in style that cannot be found in the collegiate Court judgments. [75] Broadly, the length and detail of Opinions have increased steadily over time. Several of the early Advocates General were drawn from the French courts and employed a typically succinct style.[76] As Clément-Wilz notes, greater numbers of academics have been appointed to the roles of both judge and Advocate General in recent years, which may have contributed to a more comprehensive style of assessing the legal arguments and presenting

[73] Article 252 TFEU.

[74] Lasser (n 49) 27; Case C-6/90 *Francovich and Bonifaci v Italy* EU:C:1991:221, para 43.

[75] Lasser (n 49) 11.

[76] Alan Dashwood, 'The Advocate General in the Court of Justice of the European Communities' (1982) 2 LS 202, 206.

their reasoning.[77] It has undoubtedly led to a proliferation of useful footnotes. The effect is still subject, however, to individual Advocate Generals' personal styles and might be regarded as, at best, a rule of thumb.

References to Member States' arguments (and by implication their policy preferences) may form a small part of an Opinion, but insofar as they contribute to the reasoning, they make a permanent impression on EU law. This applies even if it does not appear that the judges followed the Advocate General's argument. Tridimas makes the case that Opinions, even if the solution they proffer is not followed in a given dispute, contribute to the development of EU law and form a permanent part of the *acquis jurisprudentiel*.[78] In that sense, whatever is included of Member States' legal arguments might also be said to acquire a permanent place in the *acquis*.[79] Hinarejos likewise says that '[t]he Opinion, regardless of whether it is followed by the Court or not, may contribute to the deliberative nature of the judicial process and foster trust among the citizens by making part of these deliberations accessible and understandable.' She applies the term 'discursive legitimacy' to the production by a court of reasoning that is 'explicit, transparent and convincing' and argues that such discursive legitimacy as the Court of Justice achieves can partly be attributed to the 'discursive space' offered by the Opinion[80]—within which Member States' contributions are included.

Limitations

First, the Advocate General's Opinion is not necessarily comprehensive. The purpose of the Opinion is not primarily to provide an account of the governments' positions, and the Advocate General may not mention all the Member States that submitted observations or analyse their positions on each legal issue.[81]

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[77] Laure Clément-Wilz, 'The Advocate General: A Key Actor of the Court of Justice of the European Union' in Catherine Barnard, Marcus Gehring and Iyiola Solanke (eds), *CYELS Vol 14 2011–2012* (Hart 2012) 600; see also the analysis of judges' backgrounds in Marcella Favale, Martin Kretschmer and Paul C Torremans, 'Is There a EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice' (2016) 79 MLR 31.

[78] Tridimas (n 29) 1386.

[79] Hinarejos (n 42) 14.

[80] Hinarejos (n 42) 16.

[81] See for example Case C-475/03 *Banca popolare di Cremona* EU:C:2006:629, in which fifteen Member States submitted observations for the reopened hearing: only six of these are discussed by AG Stix-Hackl in her 187-paragraph Opinion and none are mentioned in the 40-paragraph judgment.

Secondly, it is important not to assume that, even if the Advocate General describes the Member States' positions, the judges take them into account. Although the Advocate General lays out the legal background to a case, appraises the submissions and often reviews academic discussion on an area of the law, the Opinion and its logic do not necessarily form the basis of the Court's judgment even when the Court's decision is the same.

A comprehensive discussion of the role and influence of the Advocate General is outside the scope of this thesis, but this particular point is highly relevant. Knowledge of the content of Member States' arguments is only a beginning; the next (and large) step is to discover whether the Court listens to the arguments and takes them into account. This question is analogous to the often-debated question of whether the Court follows the Advocate General's Opinion, and the methods of answering it are similar. The question may be addressed from both theoretical and empirical viewpoints.[82] These may overlap, as they frequently include case studies: Burrows and Greaves, for example, consider the contributions of three Advocates General to the development of specific areas of substantive law.[83] Empirical studies include both quantitative and qualitative approaches: for example, an econometric study by Arrebola, Mauricio and Portilla concluded that in annulment cases, the Court is 67 per cent more likely to annul a measure if the Advocate General so advises,[84] while Zakharenko's qualitative analysis of a sample of infringement cases revealed that in over 75% of cases, the wording used in the concluding statements of both the Advocates General and the Court was identical.[85] This finding is particularly interesting given the difficulty of diagnosing whether the Advocate General's Opinion was followed in early cases, where the Court did not refer to the Opinion at all. To some extent this omission may still occur: several authors draw attention to cases where the Court makes no reference to points that were raised by Advocates General of their own accord, or raised by interested parties and regarded as

[82] E.g. Tridimas (n 29); Vlad Perju, 'Reason and Authority in the European Court of Justice' (2009) 49 Virginia Journal of International Law 307; Michal Bobek, 'A Fourth in the Court: Why Are There Advocates General in the Court of Justice?' in Catherine Barnard, Marcus Gehring and Iyiola Solanke (eds), CYELS Vol 14 2011–2012 (Hart 2012); Tamara Ćapeta, 'The Advocate General: Bringing Clarity to CJEU Decisions? A Case-Study of Mangold and Kücükdeveci' [2012] CYELS Vol 14 2011–2012 563.

[83] Burrows and Greaves (n 30).

[84] Carlos Arrebola, Ana Julia Mauricio and Héctor Jiménez Portilla, 'An Econometric Analysis of the Influence of the Advocate General on the Court of Justice of the European Union' Legal Studies Research Paper Series 3/2016) (2016).

[85] Roman Zakharenko, 'Invisible Influence? The Role of the Advocate General in the European Court of Justice on the Development of Community Law' (American University, Washington 2012) <http://islandora.wrlc.org/islandora/object/1112capstones%3A129> accessed 5 August 2020.

important by Advocates General. Ćapeta, for instance, notes that in *Dominguez*[86] the Court's judgment does not refer to an argument that was put forward by the Commission, the participating member-state governments and Advocate General Trstenjak.[87]

Thirdly, nearly half of judgments are now delivered without an Opinion. It can be argued that this has prejudiced the usefulness of judgments—to courts faced with the same or a similar question of EU law; to interested parties who may want to know if a particular argument is likely to fly; to companies operating within a particular area of the substantive law; to researchers and the public, and above all to their primary audience, the national courts. In *HMRC v Aimia*, Lord Hope observed that the absence of an Opinion 'places the reader at a disadvantage' and Lord Carnwath said, 'Experience shows that the Advocate-General's Opinion can often provide a fuller discussion of the principles and their practical application, against which the sometimes sparse reasoning of the judgment can be easier to understand and apply. In this case … as the present controversy demonstrates, it was an unfortunate omission.'[88] The decision to proceed to judgment without an Opinion also cuts out what may be the only source of information on Member States' legal arguments and policy preferences in a case.

Nevertheless, in the absence of Reports for the Hearing, the Opinion is the most useful source of information on Member States' legal arguments.

5. Article 15(3) TFEU and Regulation 1049/2001

Article 15(3) of the TFEU gives EU citizens, residents and businesses the right of access to documents of the EU institutions, bodies, offices and agencies—subject to some principles and conditions. Regrettably, one of those conditions is that the Court is required to grant access to documents only when exercising administrative tasks. Despite several challenges,[89] it has been established that the entire contents of the case file, including observations that were discussed in open court, fall outside the scope of the Court's administrative tasks. There is much to criticise in this state of affairs, especially as the General Court and, in its day, the Civil Service Tribunal

[86] Case C-282/10 *Dominguez* EU:C:2012:33.

[87] Ćapeta (n 82) fn 96. See also Case C-34/09 *Ruiz Zambrano* EU:C:2011:124 , with reference to the Charter of Fundamental Rights.

[88] *HMRC v Aimia* [2013] UKSC 15.

[89] Most notably in the appeal cases collectively known as *API* (Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* EU:C:2010:541).

have not interpreted the requirement for openness and transparency so parsimoniously.[90] The conclusion for this particular research, however, is that the provisions for access to documents are a dead end.

6. The oral arguments

While (absent a successful freedom of information request) written submissions are available in summary or not at all, oral submissions are available to those who attend the hearing. Attending cases of interest is not entirely unfeasible, as the source and subject-matter of pending cases are searchable on the Court's website, as is the Court's diary.[91] Professional and special-interest bodies also monitor some areas of the law: the Intellectual Property Office, for instance, has procedures for monitoring relevant EU cases and informing its subscribers.[92] Rarely, for reasons connected to security or in cases concerning children, the public may be barred from hearings,[93] but an energetic researcher with sufficient resources might succeed in attending the majority of oral hearings.

Limitations

The primary limitations, apart from lack of practicality, are that perhaps one-third of cases do not have an oral hearing and that Member States which have submitted written observations do not invariably attend if there is.

7. The assumption that governments' pleadings will support their own departments

In the absence of information from any of the sources discussed above, or for the sake of convenience, an alternative assumption has been that a government's observations will be in support of the ministry (or 'emanation of the state') that is a party to the proceedings. Stone Sweet, for instance, argues that this assumption was the basis of Carrubba's reasoning when he used data on member-state observations in support of an intergovernmentalist model of EU legal

[90] Alemanno and Stefan (n 16); Päivi Leino, 'Just a Little Sunshine in the Rain: The 2010 Case Law of the European Court of Justice on Access to Documents' (2011) 48 CML Rev 1215; Steve Peers, 'Case Law Summary: EU Access to Documents Regulation' (*Statewatch*, 2010) <https://www.statewatch.org/analyses/no-116-eu-case-law-summary-access-regulation.pdf> accessed 31 July 2020.

[91] <http://curia.europa.eu/jcms/jcms/Jo2_17661> accessed 31 July 2020.

[92] <https://www.gov.uk/government/publications/references-to-the-court-of-justice-of-the-european-union/references-to-the-court-of-justice-of-the-european-union-2015> 31 July 2020.

[93] Article 79 of the Rules of Procedure (n 1).

integration.[94] Such an assumption is rarely better than a general guideline and can be shown in some cases to be unsafe: for instance in *Larsson*, in which the Danish government in its observation suggested that a Directive precluded the operation of Danish law as it then stood.[95]

It is clear that, while it is possible to discover their number and sources, there is no single, consistent source of information on the *content* of legal arguments put before the Court in the form of observations. It can be argued that the Court's position on access to judicial files is inconsistent with the principles of open justice. Much the same might be said of the position of many governments. The normative implications of this lack of openness are outside the scope of this thesis. However, an immediate consequence is that both legal scholars and political scientists studying the Court have tried to maximise the information that can be extracted by reworking the statistics that they *can* obtain. The effort has not been unfruitful, as will be seen. However, it should be noted that this thesis is not another attempt to use statistics *directly* either to explain the decision-making of the Court or to deduce governments' motivations. Instead, statistics will serve to raise questions that may be addressed more qualitatively. There will be two angles of attack: firstly to look at the frequency and (as far as is possible) the contents of states' observations, and then to consider what factors contribute to the differences between the Member States, with particular emphasis on the contrasting behaviour of Denmark, Ireland and the UK.

Methods

This section deals with the methods used to extract information on member-state submissions from a hierarchy of sources:

- Biographical information available from the Court itself: i.e. which Member States submitted observations on each case
- Reports for the Hearing: summaries of Member States' arguments
- Possible methods of obtaining detailed information on the contents of Member States' submissions.

The section first describes the method used to compile the dataset that was used to demonstrate national variations in government submissions to the Court of Justice. This is followed by a

[94] Alec Stone Sweet and Thomas Brunell, 'How the Legal System of the European Union Works - and Does Not Work: Response to Carrubba, Gabel, and Hankla' (Faculty Scholarship Series, Yale Law School 2010).
[95] Case C-400/95 *Larsson* EU:C:1997:259.

description of the information obtained from the Reports for the Hearing compiled by the Centre for European Research at the University of Gothenburg (CERGU), along with an introduction to CERGU's own project and results and the use made of them in this thesis.

Compiling the dataset of member-state observations

The data collected by Stone Sweet and Brunell for their research on European integration up to 2006 were used as the basis for the further analysis carried out for this research. For their first paper, published in 1998, Stone Sweet and Brunell compiled information on every Article 267 TFEU reference filed with the Court of Justice from 1961 to 1995, although their published dataset did not include any information on the observations submitted.[96] The dataset was extended to 2006 for research they undertook for the European Commission's New Modes of Governance Project (NewGov), which was published in 2007.[97]

Information added: 2007-2013 and observations

For this thesis, biographical data from the Curia database were used to code the preliminary reference cases from 2007 to 2013, using Stone Sweet and Brunell's methodology and codes (below) with the addition of new codes for some areas whose importance was not envisaged when the Court's classification system was designed. The sources of all the observations submitted by the EU institutions, the Member States, EFTA members and third parties were then added for each case, amounting to 16,964 separate submissions in 5,562 cases. It should be noted that most of these are best described as *sets* of observations: most submissions do not confine themselves to a single question. Naurin, Cramér and others discuss the complications that this adds to the study of member-state behaviour, and the results of their more detailed question-by-question analysis have been employed in later chapters.[98]

[96] Alec Stone Sweet and Thomas L Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) 92 APSR 63, 67.

[97] Alec Stone Sweet and Thomas L Brunell, 'The European Court and National Courts: Dataset on Preliminary References in EC Law (Art 234), 1961-2006' <http://www.eu-newgov.org/datalists/deliverables_detail.asp?Project_ID=26> accessed 31 July 2020.

[98] Daniel Naurin, Per Cramér, Olof Larsson, Sara Lyons, Andreas Moberg and Allison Östlund, 'Coding observations of the Member States and judgments of the Court of Justice of the EU under the preliminary reference procedure 1997-2008 Data report' (2013) CERGU Working Paper Series 2013:1.

Choice of cases

Only cases for which the Court has published a judgment were added to the dataset. Cases that ended in an order of the Court were excluded, as orders typically state either that a case is inadmissible or that no interpretation of EU law is necessary.

Coding

Stone Sweet and Brunell's dataset records the following information in the form of numerical codes:

- The originating country
- The year the case was filed
- The case number
- The status of the case (ended by a judgment, ended by an order, pending, removed from the register or joined to another case)
- One or more codes indicating the subject matter(s) of the case (see Appendix A)
- The substantive area(s) of EU law being litigated, coded as 1 (one of the subject matters falls into the substantive area) or 0

For this thesis, further information was added:

- A code to indicate the accession group to which the originating country belongs
- EU institutions, member and non-member states and other organisations submitting observations in each case
- For selected years, the level of the national court from which the reference originated, the status of the parties (both private, one party a government body or 'emanation of the state', criminal case), whether there was an oral procedure and/or an Opinion of the Advocate General, and the presidency

For example, *Metock*,[99] which considered the scope of the right of residence of nationals of non-member countries who are family members of a Union citizen, is coded thus (excluding columns for Member States not making observations):

[99] Case C-127/08 *Metock* EU:C:2008:449.

country	8	Ireland
filedate	2008	
case	127	
decision	1	Case ended by a judgment of the Court
matter 1	339	European citizenship
matter 2	376	Free movement of workers
movework	1	Free movement of workers and persons
accession	9	1973 accession group
Commission	1	Observations submitted by Commission
Germany	1	Observations submitted by Germany
Netherlands	1	Observations submitted by the Netherlands
Denmark	1	Observations submitted by Denmark
UK	1	Observations submitted by the UK
Greece	1	Observations submitted by Greece
Austria	1	Observations submitted by Austria
Finland	1	Observations submitted by Finland
Cyprus	1	Observations submitted by Cyprus
Malta	1	Observations submitted by Malta
Czech	1	Observations submitted by Czechia

Before analysing the database, cases coded as joined to a primary case were dropped so as to avoid multiple counting of cases involving the same legal dispute or decision.

Subject matters and substantive areas

The subject-matter codes used by Stone Sweet's group refer to the classification system developed by the Court of Justice, which forms part of the biographical information available for each case. For example, Stone Sweet took cases classified by the Court as concerning the environment and coded them 355; those on the free movement of capital were coded 366, and so on. The majority of cases are classified as having more than one subject; some may have more than the five allowed by the database, in which event closely allied subjects have been joined. Some inconsistency in the use of these codes was found. To take two cases on selling arrangements as examples, in *Keck*[100] the single code for measures having equivalent effect was

[100] Cases C-267 and 268/91 *Keck and Mithouard* EU:C:1993:905.

used; in *Gourmet International*[101] the group used the three codes for free movement of goods, quantitative restrictions and measures having equivalent effect. In practice, this rarely affects the analysis, because closely related subject matters are grouped into substantive areas of the law (or 'meta-categories'), and it is the number of cases with at least one entry in a given substantive area that has been used for the charts above.

The substantive areas listed in the table above reflect most of the main areas of EU law: agriculture, the four freedoms, competition and so on. In 2007, Stone Sweet and Brunell calculated that the meta-categories covered around 90% of the subject matters referred.[102] New categories may readily be added as required: fundamental rights, intellectual property and public procurement come to mind. Over the full period of the expanded database, only 9% of cases had no subject matters that fell into any of the original meta-categories; most had one or two and a handful of more complicated cases had three to five.

Subject classifications

For most cases, the subject classification could be derived directly from the subject matter given in the biographical information published on EUR-Lex. The example in Figure 1 is for Case C-127/08 *Metock*.[103]

Figure 1: Screenshot of Classifications section of biographical information

However, some cases were found in which the subject matter listed in the biographical information did not match the keywords given therein. For those, the summary information, the

[101] Case C-405/98 *Konsumentombudsmannen v Gourmet International Products AB* EU:C:2001:135.

[102] Alec Stone Sweet and Thomas L Brunell, 'The European Court and National Courts: Data Set on Preliminary References in EC Law, NEWGOV Project' (2007) 1 <http://www.eu-newgov.org/database/DELIV/DLTFIID04a-Data_Set_Preliminary_References_Art234_1961-2006.pdf> accessed 31 July 2020.

[103] Case C-127/08 *Metock* EU:C:2008:449.

'notes de doctrine' provided by the Court's Library and Documentation Service,[104] and occasionally the full judgment were consulted to decide on the coding. In addition, some cases are classified as 'Approximation of Laws': most of these are on a limited range of topics that have assumed greater importance over the years. For these, new subject codes were created.

[104] <http://curia.europa.eu/jcms/jcms/Jo2_7083/> accessed 31 July 2020.

Chapter 3: Member States' observations as a measure of engagement with EU law

Introduction

In the introductory chapter, it was contended that a great deal of information about Member States' perception of their role in the European Union might be obtained by examining their interactions with the Court of Justice—specifically, the interactions of their executive branches with the Court. This chapter will demonstrate that preliminary reference cases provide the main opportunity for such interactions. It will then examine the developing importance that governments have attached to their participation in the preliminary reference procedure, before looking at some variations in Member States' levels of engagement with the Court. The chapter will conclude with a survey of the explanations for those variations offered in the literature.

A Member State's interactions with the Court can arise in several different circumstances, some sought out by the member-state government and others not. There is at least as much information to be obtained from a government's voluntary participation in court proceedings as when a government is a party to the court action. A government may be a party if it is the subject of a direct action brought by the Commission for failure to fulfil a Treaty obligation,[1] if the government appeals a case at the General Court, or if a ministry or public body is a party to a national case that gives rise to a preliminary reference.[2] Strictly speaking the proceedings in preliminary references are non-contentious, the Court only ruling on the interpretation of EU law and not on the national case, but the government body in question will usually feel obliged to be represented in Court.

Governments' freely submitted legal arguments to the Court arise in three circumstances: firstly where a government intervenes—as opposed to being a party—in a direct action; secondly, where it makes observations in a reference from one of its national courts in which it is not a party; and thirdly and arguably most interestingly, in preliminary reference cases from the courts of other Member States. To varying degrees, all these submissions are voluntary and proactive rather than perforce and reactive. Their status is slightly different depending on the type of case. In direct actions and appeals, a government must request leave to intervene and may only do so in support

[1] Or, rarely, brought by another Member State.

[2] Case C-188/89 *Foster v British Gas* EU:C:1990:313.

of the form of order sought by one of the parties; [3] a wish to intervene in support of the legal arguments of one of the parties is insufficient.[4] The submission of observations in preliminary reference cases needs no such leave and is indeed invited, with the opportunity for states to submit observations being explicitly safeguarded by the Court.[5] Equally, the observations need not be in support of any legal arguments of the parties, although they must address the questions referred. Thus the scope of the legal arguments in preliminary reference cases, as well as the opportunity to put them forward, is more extensive.

A Member State's rationale for submitting observations in other states' cases is one of the main focuses of this thesis, particularly as it is evident that they may do so in cases where the result has no immediate national implications. This will be examined in detail in a Chapter 5. The present chapter will explore, in general terms, explanations of Member States' participation in preliminary reference cases that suggest the parameters that Member States may take into account when deciding whether to engage with the Court.

The following two sections will look at member-state government submissions to the Court in historical terms. The first will demonstrate the current importance of this avenue of communication with the Court via a snapshot of all such communications in a single year; the second will examine the historical development of governments' use of observations.

Member States' engagement with the Court of Justice: the importance of observations in preliminary references

Preliminary references form the majority of cases that come before the Court of Justice, thereby fostering a strong link between the legal system of the EU and the implementation of that legal system in the jurisdictions of the Member States. Not only are preliminary references the active link between the national courts of the Member States and the legal system of the EU, but they offer a crucial opportunity for communication between the governments of the Member States and the legal system of the EU. Both can be demonstrated by looking at the Court statistics for a single year (2013).[6]

[3] Article 40 of Protocol (No 3) on the Statute of the Court of Justice of the European Union, para 4.

[4] Case C-116/77 *Amylum v Council and Commission* EU: C:1978:81, Order of the Court of 12 April 1978, para 7.

[5] Case C-322/15 *Google Ireland and Google Italy* EU:C:2016:672, para 17.

[6] 2013 was chosen as the latest year analysed for this database.

Preliminary references made up 450 of 699 of new cases coming before the Court (Figure 2).[7] These numbers ignore subsequent joinder: one case number equates to one case. Each represents an approach by a national court that finds itself unable to reach a judgment without a ruling from the Court of Justice.

To calculate governments' contacts with the Court, it is necessary to look instead at completed cases since these are the records for which the numbers of interventions and observations are available. The number of completed cases can again be obtained from the Annual Report and ignores joinder (Figure 3). The number of interactions between member-state governments and the Court can be determined by consulting the Court's Annual Report and the individual

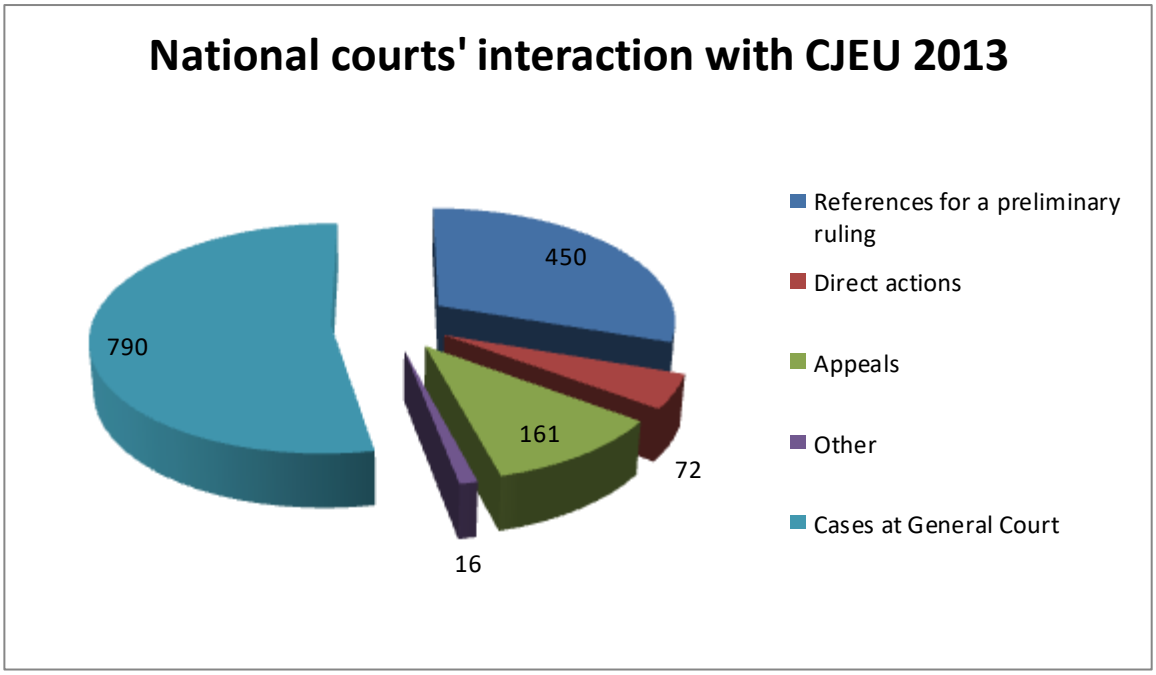

Figure 2: New cases coming before the Court 2013

[7] Court of Justice of the EU, 'The Court of Justice in 2013: Changes and Activity' (2013).

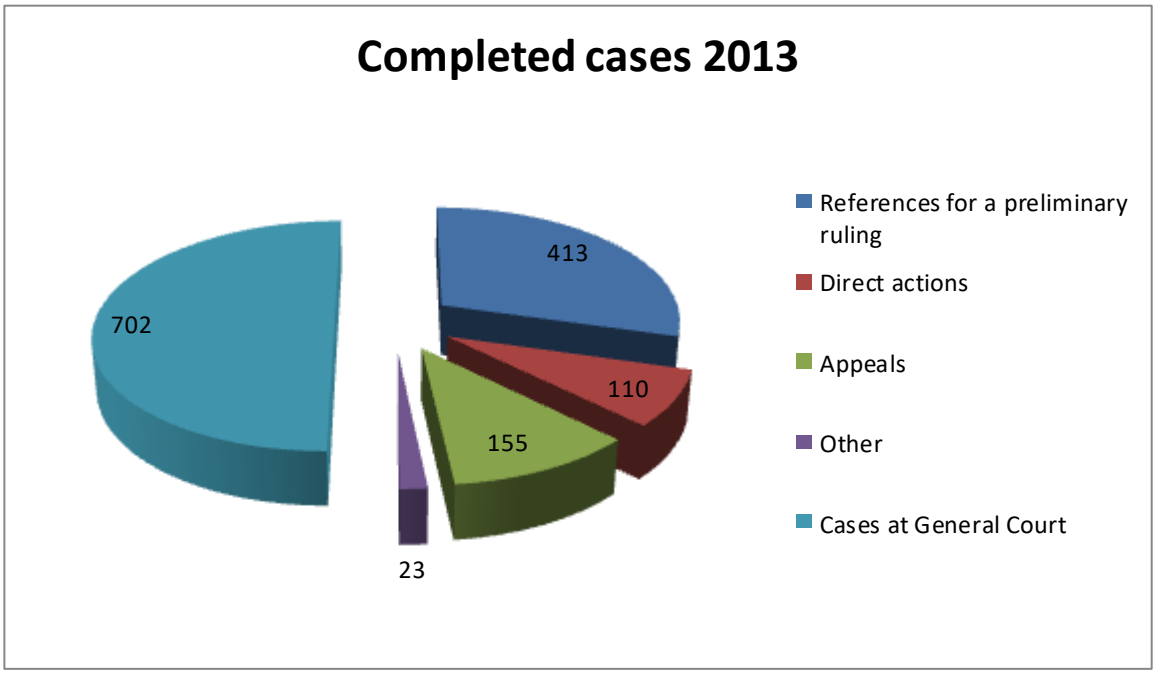

Figure 3: Completed cases 2013

judgments using the Curia website, as described in Chapter 2. From these, it is possible to obtain the number of cases in which each Member State was a party, intervened in a direct action or submitted observations in a preliminary reference case, for both the Court of Justice and the General Court.[8] The full results, broken down by Member State, may be found in Appendix B, Table 1; they are summarised in Figure 4.

[8] Information obtained from the Curia database <http://curia.europa.eu/juris/recherche.jsf?language=en> accessed 31 July 2020.

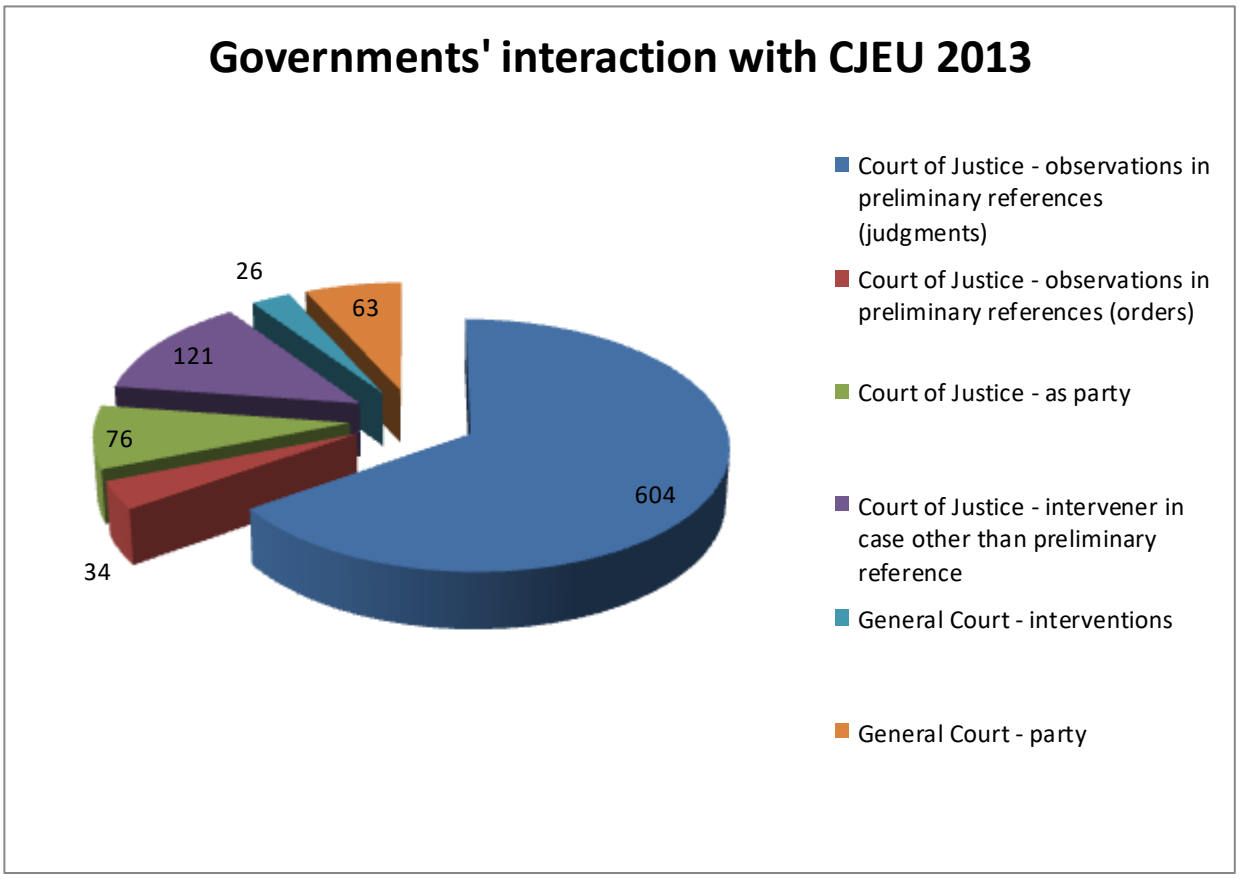

Figure 4: Governments' interaction with the CJEU 2013

Figure 3 shows that, in 2013, 413 of the 1,403 completed cases at the Court of Justice and the General Court were preliminary references. But Figure 4 shows that observations in these preliminary reference cases made up 638 out of 924 *contacts* with the Court of Justice and the General Court. In other words, government observations in preliminary reference cases represented 69% of all such communication: 65% in cases that went to a judgment and 4% in cases that resulted in an Order of the Court. As noted in Chapter 2, the database only counts the observations submitted in cases that produced a judgment. It is rare for observations to be made in cases that result in an Order of the Court (2013 was unusual in that one case, *Intelcom*, attracted observations from nine states) and the amount of information available about such cases is both less and inconsistently recorded.[9] This demonstrates clearly that, at least in numerical terms, these observations are the main avenue of communication between the Court and the governments of the Member States. In an additional 8% of cases at the Court of Justice, a Member State was a party to the proceedings—the vast majority of these being infringement

[9] Case C-600/13 *Intelcom* EU:C:2014:609.

proceedings under Article 258 TFEU—and a further 13% were interventions in direct actions in which another Member State was a party. Notably, these interactions with the Court of Justice make up fully 90% of member-state governments' interactions with the Court as a whole, even though the General Court handled slightly more than half of all the cases brought in 2013. In only 7% of cases, a Member State's interaction with the Court consisted of it being a party in a case heard before the General Court; observations in such cases made up a mere 3% of all interactions.

Based on these findings, the remainder of this thesis will assume that trends and patterns in the submission of observations in preliminary reference cases that proceed to a full judgment are a useful measure of Member States' interactions with the Court as a whole.

Member States' interactions with the Court of Justice: the developing importance of preliminary references over the history of the EU

This section will examine the historical development of Member States' submission of legal arguments in preliminary references.

In the beginning, governments were not offered much opportunity to interact with the Court because their courts were slow to avail themselves of the preliminary reference procedure. The Court of Justice received its first reference in 1961, more than three years after the entry into force of the Treaty of Rome: it celebrated the arrival of *Bosch*[10]—a reference from the Court of Appeal in The Hague—with champagne.[11] Of the thirteen preliminary references up to the end of 1964, ten came from courts in the Netherlands. Those thirteen cases garnered sixteen submissions in total from Member States—four in *Bosch*,[12] three each in *Van Gend* and *Albatros*, six further cases getting one and four getting none—from five of the six Member States.[13] The sixth Member State, Luxembourg, submitted no observations to the Court until 1971—and indeed has done so in only one per cent of cases in the 53 years covered in this thesis. In comparison, Germany has submitted observations in over twenty per cent of cases, despite not doing so in many references from its own courts. It is immediately apparent that the governments and courts of the Member States display varying degrees of engagement with the Court of Justice.

[10] Case 13/61 *De Geus en Uitdenbogerd v Bosch* EU:C:1962:11.

[11] Catherine Barnard and Eleanor Sharpston, 'The Changing Face of Article 177 References' (1997) 34 CML Rev 1113, 1117.

[12] Dennis Thompson, 'The Bosch Case' (1962) 11 International and Comparative Law Quarterly 721.

[13] Case 26/62 *Van Gend & Loos* EU:C:1963:1; Case 20/64 *SARL Albatros v SOPECO* EU:C:1965:8.

As noted in the introductory chapter, nearly half the cases in the 1960s received no observations from national governments. Of the most significant early cases to come before the Court, *Van Gend* received observations from three out of six governments and *Costa* did so only from Italy.[14] But from the mid-1970s, the proportion of cases that received input from national governments began to rise, reaching nearly 70% in the 1980s, over 80% in the 1990s and 93% in the period from 2007 to 2013 (Table 1, Figure 5).[15] This rise is not merely a result of there being more Member States, because the bulk of observations still come from the older members. In fact, in the period since the fifth enlargement in 2004, 40% of the observations have come from the founding six Member States, and 75% from the pre-existing fifteen.

A small number of cases have attracted very many observations: two—*BASF* and *Banca Popolare di Cremona*[16]—received observations from 14 of 15 states; four—*Meng*, *Reiff*, *Ohra* and *Schindler*[17]—received observations from 11 of 12 and two—*EMI* and *Terrapin v Terranova*[18]—from 7 of 9. Nevertheless, by 2013 and with 27 Member States, the average number of submissions per case remained at two, and the maximum, in *Hirvonen*, was eight.[19]

[14] Case 6/64 *Costa v ENEL* EU:C:1964:66.

[15] The decrease in observations after 2011 appears to be the beginning of a genuine trend.

[16] Case C-44/98 *BASF* EU:C:1999:440 (free movement of goods, IP); Case C-475/03 *Banca Popolare di Cremona* EU:C:2006:629 (VAT).

[17] Case C-2/91 *Meng* EU:C:1993:885, Case C-185/91 *Reiff* EU:C:1993:886, Case C-245/91 *Ohra Schadeverzekeringen* EU:C:1993:887 (competition); Case C-275/92 *HM Customs and Excise v Schindler* EU:C:1994:119 (free movement of services, gambling).

[18] Case 96/75 *EMI Records v CBS Schallplatten* EU:C:1976:87; Case 119/75 *Terrapin v Terranova* EU:C:1976:94 (free movement of goods, competition, IP).

[19] Case C-632/13 *Hirvonen* EU:C:2015:765 (19 November 2015) (income tax).

Table 1

Percentage of preliminary references with at least one Member State observation

Period (no of Member States)	% with MS obs	Decade	% with MS obs
1961-1972 (6)	52	1961-1970	58
1973-1980 (9)	54	1971-1980	53
1981-1985 (10)	64	1981-1990	67
1986-1994 (12)	75	1991-2000	84
1995-2003 (15)	88	2001-2010	90
2005-2006 (25)	89	2011-2013	94
2007-2013 (27)	93		
Average	81		81

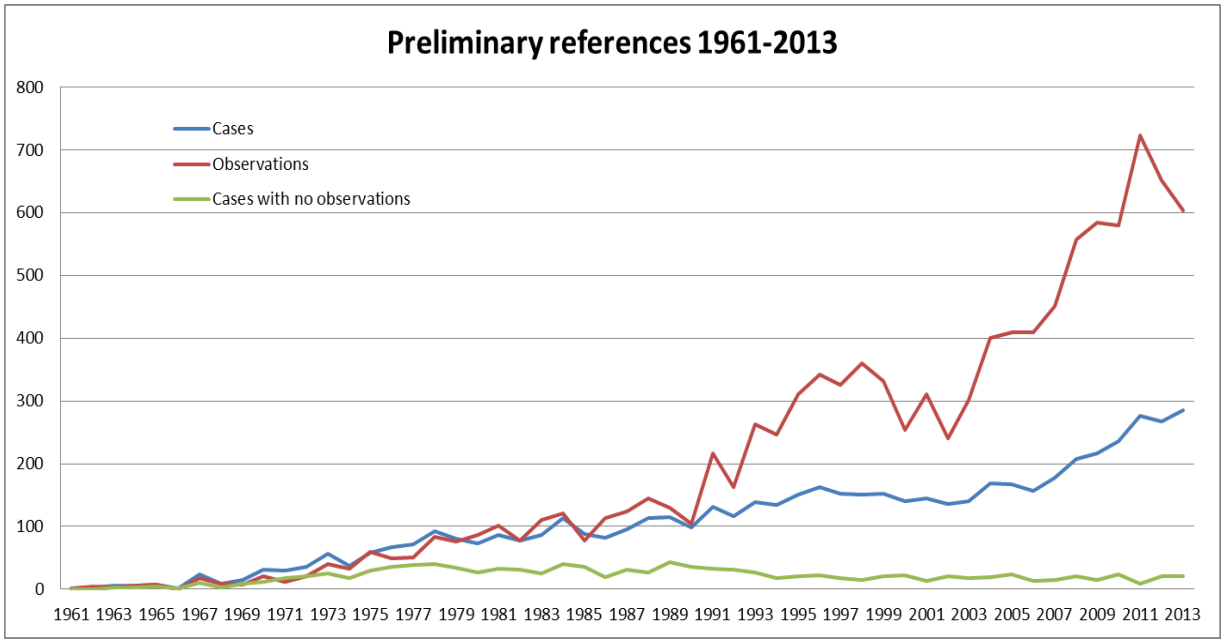

Figure 5: Preliminary references 1961-2013

The average *proportion* of the Member States making observations in a given case increased up to the 1990s but was already falling slightly before the 2004 enlargement (Figure 6). This was true for all the accession groups. The only group of countries that collectively submitted observations in an increasing proportion of cases during the 2000s was, unsurprisingly, the newest Member States (Figure 7)—and as will be seen in the next section, that is mostly down to the enthusiasm of just two of the ten new members, Czechia and Poland. Since the accession of Bulgaria and Romania in 2007, the average proportion of the 27 Member States making submissions was 9%, equivalent to two states.

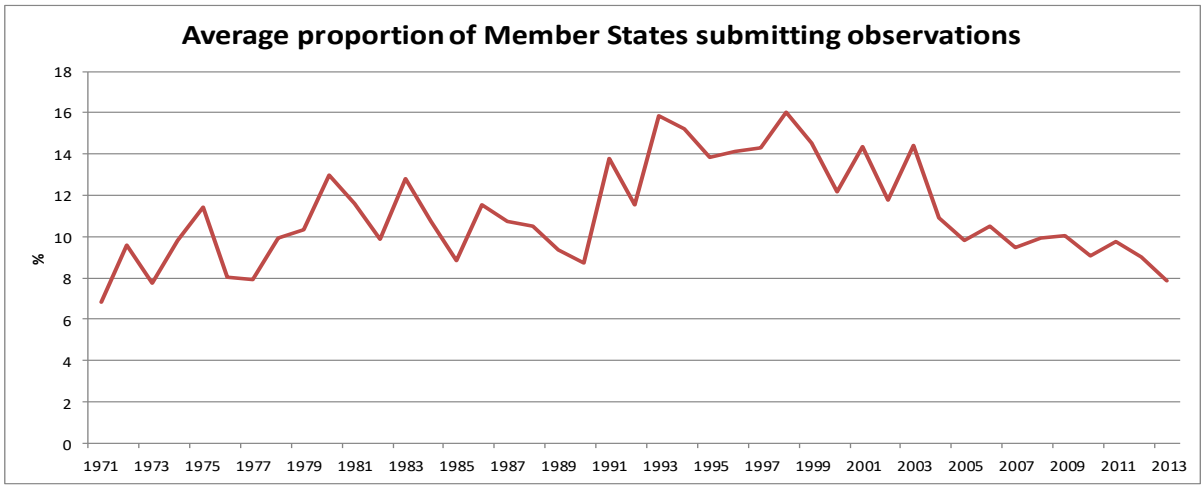

Figure 6: Average proportion of Member States submitting observations

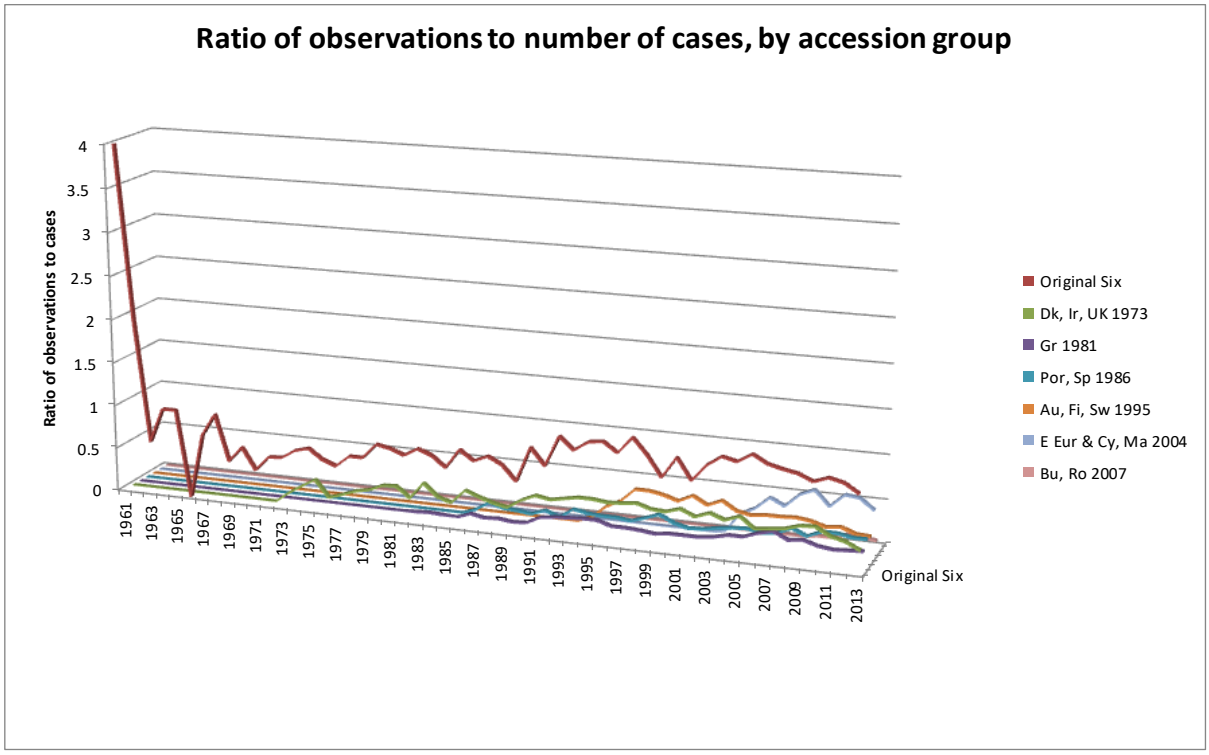

Figure 7: Ratio of observations to number of cases by accession group[20]

A distinction should be drawn here between two types of average: the mean (the average number of states interceding), which for 2013 is two, and the mode (the most common number of submissions), which is one. The typical case has a single member-state submission, which is usually from the government of the referring state. However, in 18%, that submission was from another state.[21] And across all cases, 63% of all submissions by member-state governments have been in other Member States' cases.

Just as there proved to be a broader significance to the preliminary reference procedure beyond that indicated by Article 267's wording, Member States' participation in the Court's proceedings has motives beyond the justification of national legislation, the protection of domestic revenue and the settling of technical points in states' own favour. In particular, their submission of legal arguments in cases originating in other Member States indicates that they have come to recognise preliminary reference cases as opportunities for influencing EU law in general.

[20] The high ratios of the 1960s are an artefact of the very small number of rulings: in 1961, for instance, the only case received four observations.

[21] For 104 cases with only a single government submission in 2013, that submission was from another Member State in 19 cases. One case also received a submission from the EFTA Surveillance Authority.

Member States' interactions with the Court of Justice: variation between states

A corollary of the above argument is that, without the opportunity to have such a general influence, Member States' contributions to preliminary reference cases would not go beyond technical arguments from whichever government ministry was a party. Still less would they trouble to present legal arguments in other states' cases. In fact, many Member States take submissions to the Court so seriously that they continuously monitor upcoming cases and government responses are coordinated centrally. However, it can be shown that not all Member States aspire to the same degree of influence on EU law, or at least that some are unable to fulfil such an aspiration. Their differences in behaviour are important to our understanding of what governments perceive to be the benefits of submitting observations, and why some countries struggle to realise these benefits.

The cumulative influence of Member States

The overall trends conceal a wide variation between the participation rates of different Member States. This variation may be illustrated in several ways. Figure 8 indicates the total number of submissions each Member State has made over the entire period of this study, ordered according to the date of accession of each state. The figures are not adjusted for length of membership, so they could be regarded as an *absolute* measure of the opportunity each country has had to influence EU law via the Court. Figure 8 also draws attention to the degree to which governments have used other states' cases to exert this influence.

The newer members have inevitably submitted fewer observations, but what stands out is the anomalies within groups that joined at the same time. Among the foundational six Member States, Luxembourg has made few submissions and Granger noted in 2010 that Luxembourg had only one civil servant in charge of EU litigation.[22] Although it has submitted more observations *per head of population* than any other Member State, this is simply reflects its diminutive size. Belgium's relative lack of participation is surprising, but might be accounted for by its

[22] Marie-Pierre Granger, 'Governments in Luxembourg: How Do Governments Use EU Litigation to Protect National Policies or Influence EU Policy and Law-Making (Paper Presented at ECPR Fifth Pan-European Conference on EU Politics, Porto, 24-26 June 2010)' (2010) <https://www.semanticscholar.org/paper/Paper-1596%3A-Governments-in-Luxembourg%3A-How-Do-Use-Granger/d95b6c5e9d3014db20e65728bc7fc66a5063c42a> accessed 31 July 2020; Ministère des Affaires étrangères et européennes de Luxembourg <https://annuaire.public.lu/index.php?idMin=17> accessed 31 July 2020.

constitutional structure. It has historically had difficulty in putting structures in place to anticipate which cases will be significant, and its decentralised government places the initiative on individual ministries to respond to cases within the short time-frame allowed. Granger observes that, while Belgium has a body that coordinates all the country's international litigation, its role in respect of the Court of Justice is mainly reactive.[23]

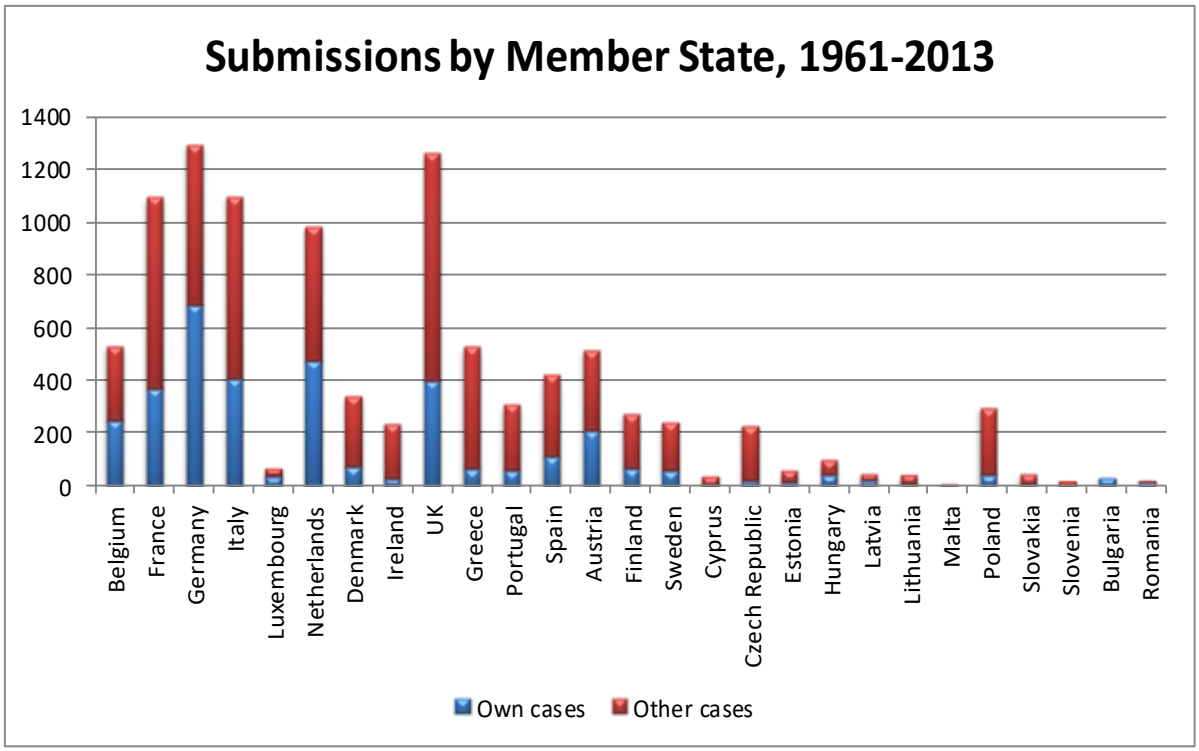

Figure 8: Submissions by Member State 1961-2013

By contrast, Germany, France, Italy and the Netherlands have been frequent participators in preliminary reference proceedings. Germany, in particular, has made the highest number of submissions to the Court of any Member State: 1,360 as compared with Luxembourg's 66, despite its having submitted observations in fewer than half of the cases referred by German national courts.[24] Germany's submission rate from the 1970s onwards mirrors the pattern of Figure 6, with a gradual increase in the percentage of cases in which it made submissions until the 1990s, peaking at 41% in 1993, and then a decline to an average of 24% of cases. Granger has a possible explanation for this trend: that countries came to recognise that 'frequent observations

[23] Marie-Pierre Granger, 'Member States' Governments and the European Court of Justice: Governments as "Repeat Players" in Judicial Decision Making at EU Level' (EUSA's Eight Biennial Conference, Nashville, Tennessee, March 26-29, 2004) 12.

[24] 871 (55%).

do not systematically equal greater influence', and points to a French government report which suggested that France's propensity to express a position on every subject had the perverse effect of reducing the visibility of its priorities.[25] Granger observes that a low rate of making observations in national cases may, paradoxically, be an indicator of an active litigation strategy with clearly defined priorities.[26]

The three states of the first enlargement—Denmark, Ireland and the UK—differ a great deal. The UK was the second-highest contributor, at 24% of cases from 1973-2013, Denmark tenth at 6.4% and Ireland sixteenth at 4.5%. These results will be discussed in Chapter 6. There is also considerable variation among the states that joined the EU in 2004. Poland and Czechia between them accounted for 59% of their submissions. Standing out most of all is Poland, which not only participated in a third more cases than Czechia but participated in more cases in its nine years of membership up to the end of 2013 (341) than Portugal in its 28 years of membership (334).

Engagement with the Court of Justice

Having looked at the absolute number of cases as a measure of each state's (potential) cumulative *influence* over EU law, we now turn to a more realistic measure of member-state governments' *active engagement* with EU law, taking each state's length of membership into account. This is illustrated in two different ways: Figure 9 shows the *proportion* of cases in which a Member State has made submissions during its membership, ordered by length of membership, and Figure 10 gives the average *number* of submissions per year of membership. The latter does not account for the increase in the number of cases over time and therefore gives more weight to those countries which joined later when the Court's case-load was higher (see Figure 5). It should also be noted that neither takes into account variations in individual governments' behaviour throughout their membership; a comprehensive diachronic analysis is outside the scope of this thesis. Despite these reservations, both charts yield interesting results in terms of national differences.

[25] Commissariat Général Du Plan, 'Organiser La Politique Européenne et Internationale de La France' (2002) 37.

[26] Marie-Pierre F Granger, 'States as Successful Litigants before the European Court Of Justice: Lessons from the "Repeat Players" Of European Litigation' (2006) 2 Croatian Yearbook of European Law and Policy 27, 38.

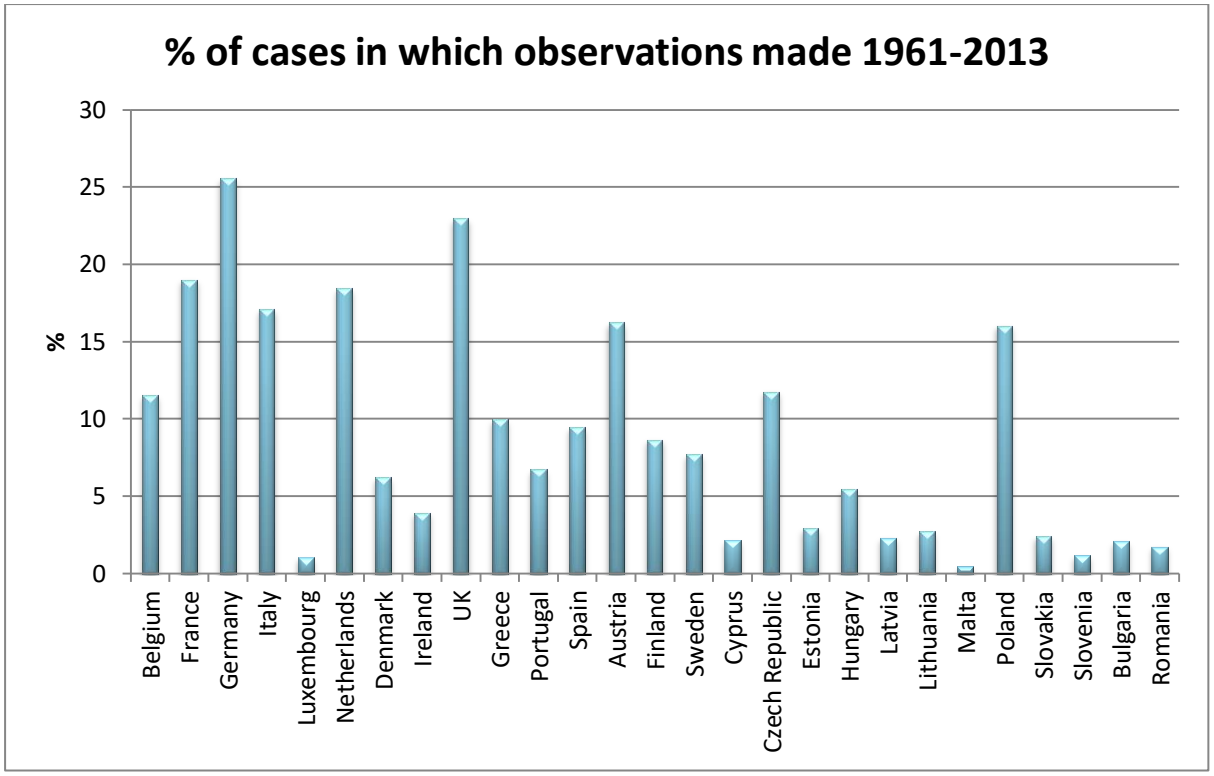

Figure 9

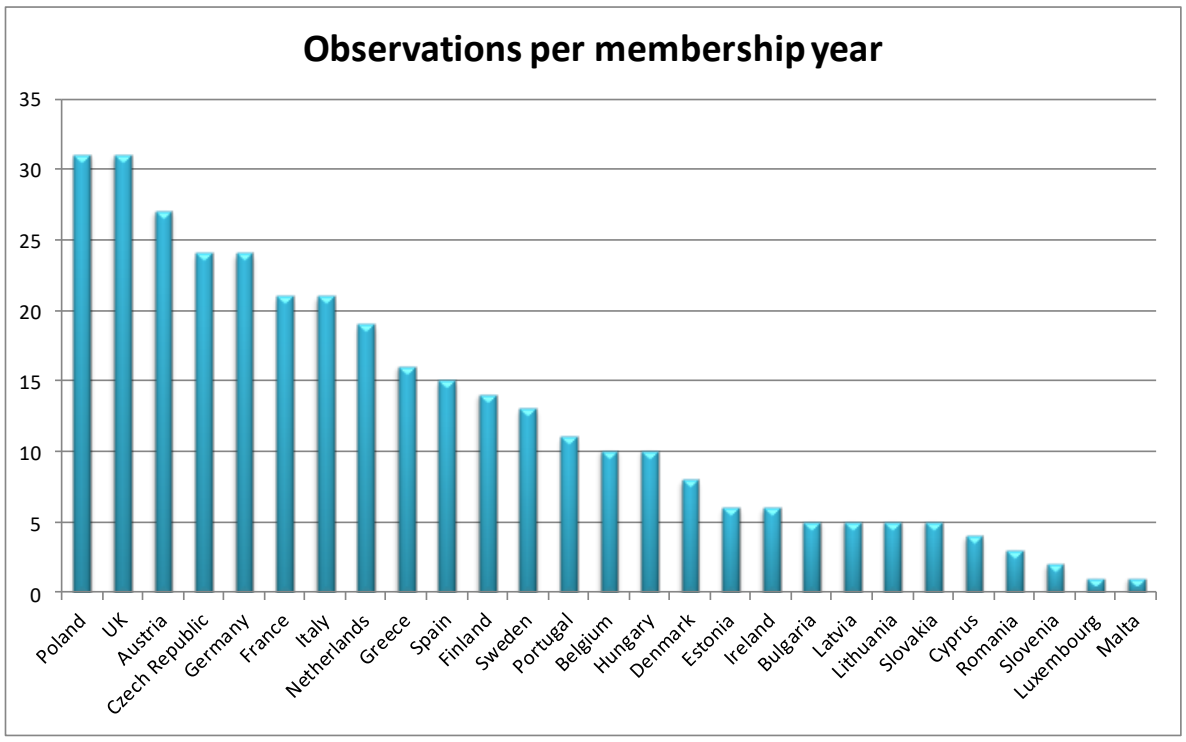

Figure 10

Some points may immediately be picked out to exemplify the diversity of national behaviour. No Member State has made submissions in more than 24% of cases. The Member State that has submitted observations in the highest proportion of cases during its membership is Germany,[27] followed closely by the UK. The smallest states, Malta and Luxembourg, have been the least active. Unsurprisingly, the size and wealth of a Member State are important factors in a Member State's decision as to whether to take part. But it is clear that other factors are also at work: these will be touched upon below.

Sources of national variation: size and wealth

While the highest levels of engagement with the Court are from the larger and wealthier countries and the lowest from smaller and poorer ones, these are not the only factors that determine the likelihood of a Member State submitting legal arguments to the Court. This may readily be illustrated by comparing Czechia and Portugal, both of which have about 10.5m inhabitants. Czechia has submitted observations in twice as many cases, proportionately, as Portugal. The sizes of their economies do not account for the difference: Portugal and Czechia have very similar-sized economies as measured by nominal gross domestic product (GDP).[28] Neither size nor wealth accounts *on its own* for the degree of a Member State's participation. It is nevertheless important to bear in mind the effect of wealth when discussing other factors that influence the Member States.

The size of the Member State's economy

The effect of the size of a Member State's economy can be examined via a simple plot of observation rate against nominal gross domestic product (GDP) (Figure 11). Unsurprisingly, there is a relationship between GDP and how likely the state is to submit observations to the Court.[29] The correlation is marked among the larger economies and less so amongst the smallest. If the lowest third of the economies are separated out, it can be seen that there is little or no relationship between their GDPs and their participation in the Court (Figure 12).[30]

[27] Although the UK's participation rate fell in the last decade.

[28] International Monetary Fund *World Economic Outlook Database October 2013* <http://www.imf.org/external/pubs/ft/weo/2013/02/weodata/weoselco.aspx?g=995&sg=All+countries+%2f+Advanced+economies+%2f+Euro+area> accessed 31 July 2020.

[29] $r^2 = 0.6917$.

[30] $r^2 = 0.0410$.

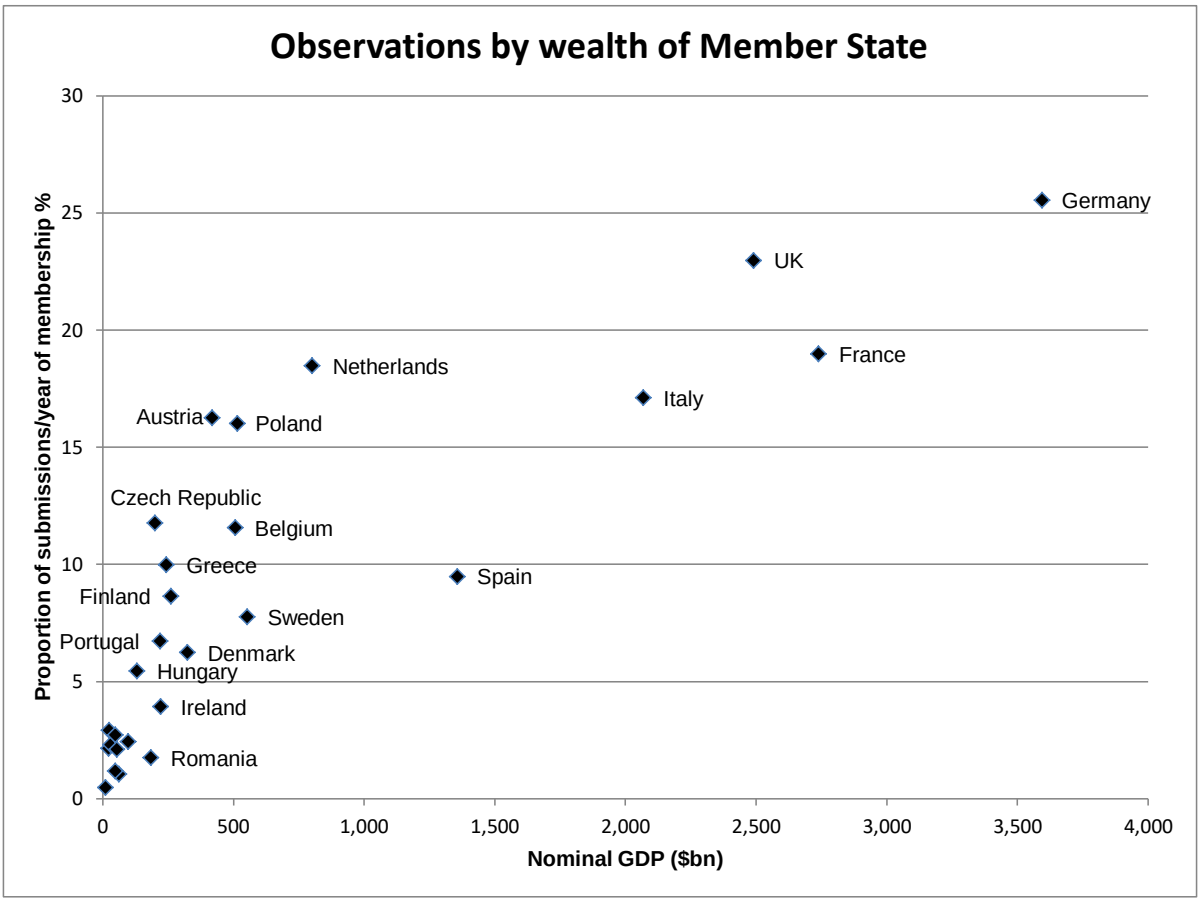

Figure 11 Observations by Gross Domestic Product (top two-thirds of economies)

The fact that relative wealth is not the sole determining factor is illustrated by Portugal and Czechia, as discussed above. It may also be demonstrated by looking at Member States that are significantly more, or less, active than a simple correlation with GDP would predict. Poland, which is the eighth largest economy but which, because of its large population, has only the 23rd highest GDP per head, is the most notable example of a state that is more active than its wealth would suggest. Sweden, on the other hand, has the 15th largest economy and the 7th largest GDP per head but makes only half as many submissions to the Court.

These observations remind us that correlation is not cause: a lack of resources would appear to be a limiting factor on participation, certainly, but governments vary in their motivations, strategies, policies and constitutional histories, all of which affect their choices of how much of their resources to dedicate to participation in the preliminary reference process.

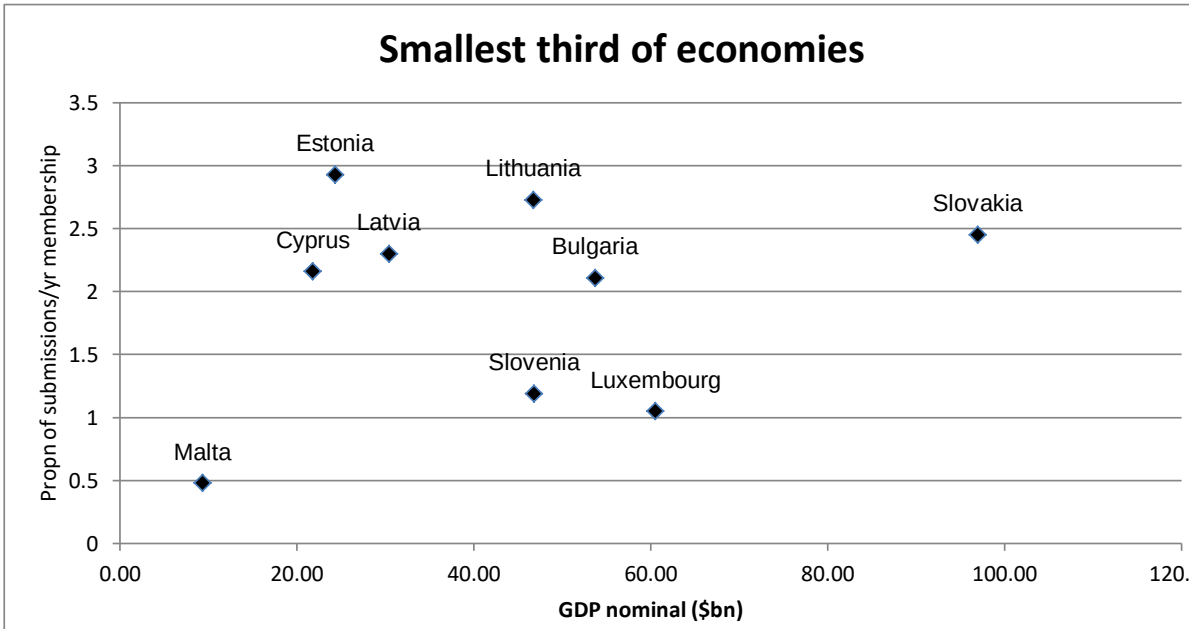

Figure 12 Observations by Gross Domestic Product: smallest third of economies

An economic measure that is more specific to EU membership and which might equally be tested as a partial explanation for national variations in observations is implied by Stone Sweet and Brunell's empirical studies on neofunctionalism.[31] Stone Sweet and Brunell found that the average number of Article 267 references made per year was strongly—and for the period 1960-1993 almost perfectly—correlated with Member States' amounts of intra-EU trade. This is a logical outcome of the neofunctionalist model, which argues that integration is the inevitable outcome of the Court's resolution of trade disputes.[32] Whether or not the neofunctionalist model is accepted, the link between a Member State's level of intra-EU trade and the number of preliminary references made by the state's courts might also be recruited as an explanation for the marked variation in member-state governments' eagerness to submit observations.

[31] Alec Stone Sweet and Thomas L Brunell, 'The European Court and Integration' in Martin Shapiro and Alec Stone Sweet (eds), *On Law, Politics and Judicialization* (OUP 2002).

[32] Stone Sweet and Brunell, 'The European Court and Integration' (n 32) 270 Fig 4.2.

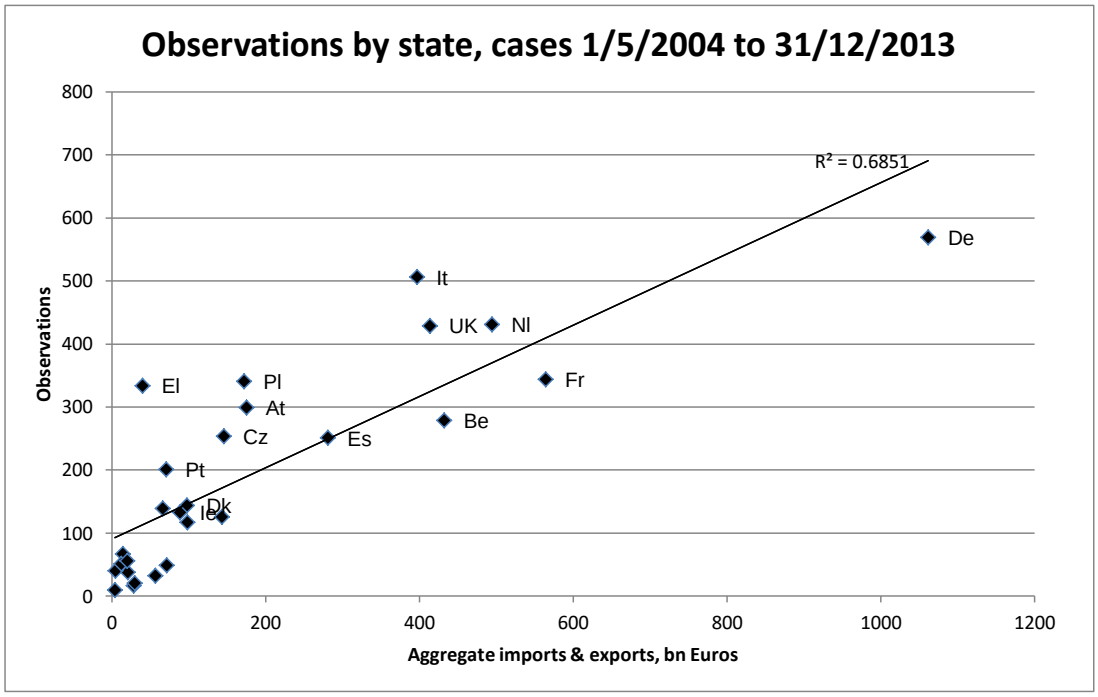

Figure 13 Observations by average intra-EU trade 2004-2013[33]

Figure 13 demonstrates that the number of observations a Member State made in the period since the 2004 enlargement is strongly correlated with its amount of intra-EU trade, but this is not unexpected. A Member State's prosperity is inextricably linked to its trade with its neighbours. Germany, for instance, makes about 67% of its considerable exports to its co-Member States and 33% internationally.[34] Only three Member States—Greece, the UK and Malta—make more external than intra-EU exports. A link between a state's prosperity and its number of submissions would be expected whether this is direct—the state can afford to participate often—or whether more import and export transactions lead to a more frequent need for dispute resolution. As with GDP, the correlation is good for the group of Member States that have medium-to-high levels of intra-EU trade and poor for the mostly smaller and less wealthy nations with lower levels of intra-EU trade. For this group, their length of membership seems to be more relevant (Figure 14).

It is also notable that of the three Member States that make more external than intra-EU imports, Greece and the UK both make more, not fewer, observations than the graph would predict.

[33] Trade figures from Eurostat < https://ec.europa.eu/eurostat/databrowser/view/tet00047/default/table?lang=en> accessed 31 July 2020.

[34] Eurostat chart <http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Intra_EU_exports_compared_with_Extra_EU_exports_by_Member_State,_2013_(%25_share_of_total_exports).png> accessed 31 July 2020.

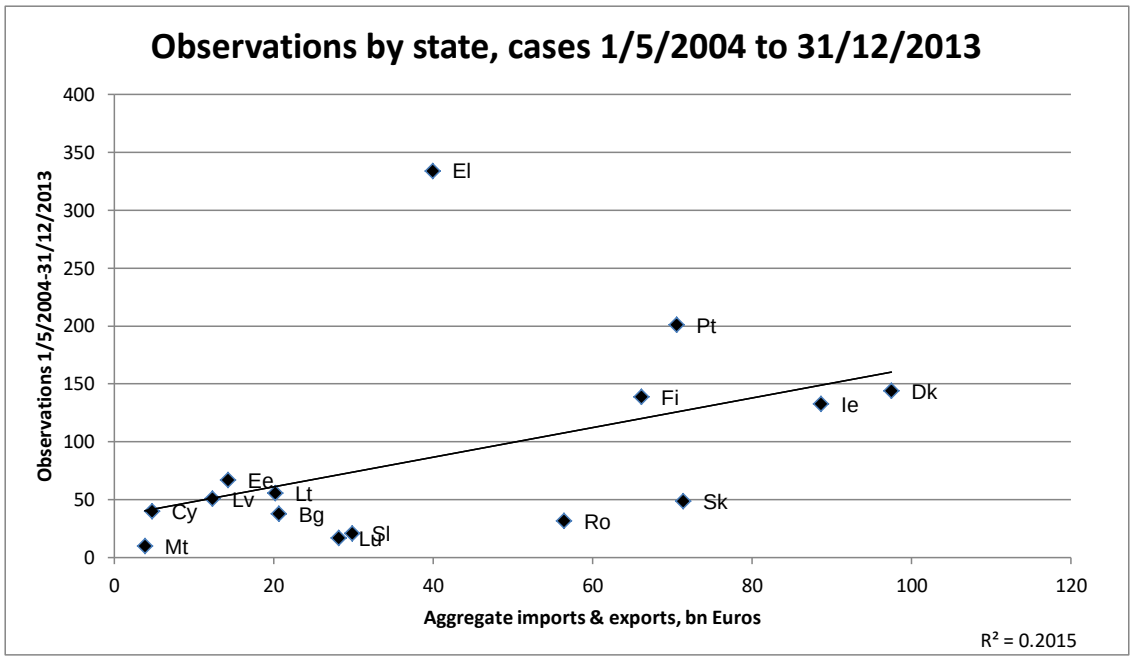

Figure 14 Observations by average intra-EU trade 2005-2013 (lower 15 countries by aggregate intra-EU trade)

Analysis

Broadly, the larger and more prosperous a state is, the more likely it is to dedicate the necessary resources to submit legal arguments to the Court. Wealth is, therefore, expected to be a confounding factor when other influences are being examined. This can largely be taken into account by picking out pairs of countries with similar GDPs; this can only be 'largely' because there is no entirely satisfactory measure of wealth. Two states with the same nominal GDP may have different financial resources because of, among other things, their types of welfare provision and their levels of national debt. Nevertheless, just as Portugal was compared with Czechia above, Poland may usefully be compared with Belgium and Sweden. The three Member States have similar GDPs, but while Belgium and Sweden have similar participation rates to each other, Poland has made more than twice as many submissions to the Court in the period since it joined the EU. It is, of course, a great deal larger, but it also seems to have hit the ground running in terms of its participation, submitting observations in 16 cases in its first eight months[35] of membership and an average of 34 per year since; indeed, Poland has provided observations at the highest *rate* of all Member States (see Figure 10). This is not merely down to the number of cases referred by Polish courts, although they have been quite active, referring 58 cases in the period

[35] The accession date of the 2004 enlargement was 1st May.

from 2004 to 2013[36]. Poland has submitted observations in cases from every Member State except Malta, the most being in German cases (68, or 20% of its total). In that respect, Poland may be contrasted with Hungary: Hungarian courts have referred somewhat more cases over the same period—76 to Poland's 58[37]—but the Hungarian government has submitted observations to the Court on only 120 occasions, as compared with Poland's 341.

Both Poland and Hungary follow the general pattern observed in the introduction to this chapter, in that the majority of their interactions with the Court consist of submitting observations—in their own cases or those of others—rather than of being parties to direct actions.[38] Only three Member States have not made observations in more cases than they have referred. One is Germany, which, as noted above, has submitted observations in less than half of its plethora of cases. Germany has a policy of leaving the task of submitting observations in cases concerning the day-to-day operation of competition law and the Single Market to the Commission.[39] The second is Bulgaria, which up until the end of 2013, had never submitted observations in another state's case (see Figure 15). Bulgaria, despite a constitutional commitment to 'participate in the construction and development of the European Union', has been reluctant to refer to the Court.[40] This has been criticised both by academic writers[41] and by the Court itself.[42] Bulgarian reluctance (or lack of administrative capacity[43]) seems to extend to government involvement in EU law in

[36] 47 of which ended in a judgment and 11 in an order of the Court.

[37] 55 of which ended in a judgment and 21 in an order of the Court.

[38] Infringement actions under Article 258, brought by the Commission; extremely rarely, actions under Article 259 brought by another Member State. Between 2007 and 2013, Hungary was a party in 12 infringement actions and Poland—in recent years the worst-offending Member State—in 59 (Court of Justice of the European Union, 'Annual Report 2014' (2015); Court of Justice of the European Union, 'Annual Report 2007' (2008)).

[39] M Seidel, 'Experiences of the Government of the Federal Republic of Germany with Article 177 References' in Henry G Schermers and others (eds), *Article 177: Experiences and Problems - Asser Institute Colloquium on European Law* (The Hague, TMC Asser Instituut 1987) 243.

[40] Article 4(3) of the Constitution of the Republic of Bulgaria <http://www.parliament.bg/en/const> accessed 31 July 2020.

[41] With respect to its Constitutional Court: Mihail Vatsov, 'European Integration Through Preliminary Rulings? The Case of the Bulgarian Constitutional Court' (2015) 16 German Law Journal 1591; cf Emiliya Drumeva, 'Prejudicial Inquiries from the Bulgarian Constitutional Court', *Constitutional Justice Journal: International Conference 'Classical and Modern Trends in the Development of the Constitutional Review' dedicated to 20th anniversary of the Constitutional Court of the Republic of Bulgaria* (2011).

[42] Case C-681/13 *Diageo Brands* EU:C:2015:471 para 27.

[43] Carl Dahlström and others, 'The QoG Expert Survey Dataset II' <http://qog.pol.gu.se/data/datadownloads/qogexpertsurveydata> accessed 31 July 2020; Aneta Spendzharova and Esther Versluis, 'Issue Salience in the European Policy Process: What Impact on Transposition?' [2013] Journal of European Public Policy 1, 10.

general[44] and to its having low 'network capital' in the legislative process.[45] The third Member State to have made fewer observations than references is Luxembourg.

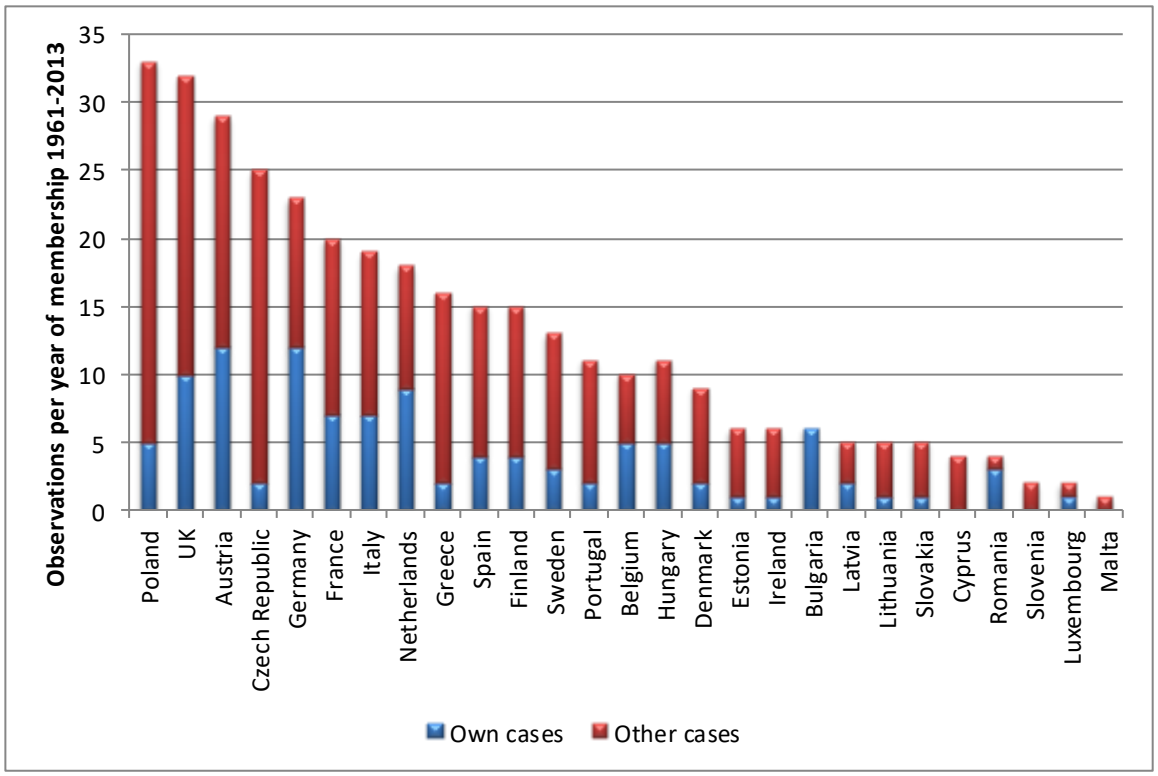

Figure 15 Member States ranked by observations per year of membership; own and other states' cases

Sources of national variation: non-economic factors influencing EU litigation

The difficulty of measuring non-economic factors

Unfortunately, many resources are less readily quantifiable than wealth, a difficulty exacerbated by the fact that economic and non-economic factors are not entirely separable. The vital resource of administrative capacity is particularly tricky: what, for instance, might be taken as a unit of administrative capacity? The observation that Luxembourg has only a single civil servant with responsibility for EU litigation might suggest 'size of EU litigation department' as a measure of administrative capacity, but it also points to the difficulty of separating factors over which a state has little short-term control, such as wealth, from those which reflect choices—in this case, a

[44] Although the Bulgarian National Assembly has issued four Reasoned Opinions on subsidiarity and proportionality to date.

[45] Daniel Naurin and Rutger Lindahl, 'Out in the Cold? Flexible Integration and the Political Status of Euro Opt-Outs' (2010) 11 European Union Politics 485 Fig 2.

conscious decision by Luxembourg to devote only a small proportion of its administrative capacity to EU law.[46]

In order to discuss non-monetary factors affecting Member States' relationships with the Court of Justice, it is first helpful to discuss how these factors may be tackled. An immediate question concerns a difference of approach that goes to the heart of academic debate about the Court of Justice: as was pointed out in the Introduction, this field is multidisciplinary, involving political scientists and scholars of international relations, economists, historians and lawyers. There is accordingly no agreement about the appropriate methodology to be applied to the study of EU integration in general or the Court of Justice in particular. Notably, a substantial proportion of those putting forward explanations for Member States' involvement in proceedings at the Court of Justice have been political scientists rather than black-letter lawyers. This has led to an emphasis on empirical research—some argue, at the expense of an appreciation of the legal logic of individual cases.[47] That point will be returned to later.

In the context of the empirical approach of this thesis, however, the point to note is that the empirical research falls into two distinct clusters, the political-science backgrounds of many scholars inclining them towards quantitative, statistical methods,[48] while others have taken a qualitative and descriptive approach.[49] These methodologies will be introduced briefly here to set the stage for a review of the factors that influence the likelihood of a Member State submitting observations to the Court of Justice.

The first, and better known, group of theories are those that centre on statistical analyses of the content of observations and is primarily aimed at proving—or disproving—the assertion that

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[46] Granger (n 22) 10.

[47] Kenneth A Armstrong, 'Legal Integration: Theorizing the Legal Dimension of European Integration' (1998) 36 JCMS 155; Lisa Conant, 'Review Article: The Politics of Legal Integration' (2007) 45 JCMS 45, 46; Anthony Arnull, 'The Americanization of EU Law Scholarship' in Anthony Arnull, Piet Eeckhout and Takis Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (OUP 2008) 425.

[48] E.g. Stone Sweet and Brunell (n 31), Clifford J Carrubba, Matthew Gabel and Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 American Political Science Review 435; Daniel Naurin and others, 'Coding Observations of the Member States and Judgments of the Court of Justice of the EU under the Preliminary Reference Procedure 1997-2008' University of Gothenburg Centre for European Research Working Paper Series (2013) 2013:1.

[49] Rebecca Adler-Nissen, 'The Diplomacy of Opting-out: A Bourdieudian Approach to National Integration Strategies' (2008) 46 Journal of Common Market Studies 663; Marie-Pierre Granger, 'When Governments Go to Luxembourg... the Influence of Governments on the Court of Justice' (2004) 29 European Law Review 1; Floris van Stralen, 'The Member States and the Court of Justice: Why Do Member States Participate in Preliminary Reference Proceedings?' (MA thesis, University of Gothenburg 2015).

Member States submit observations to constrain the Court's decision-making. The most noted exponents of the former are the intergovernmentalists Garrett, Kelemen and Schulz, and Carrubba, Hankla and Gabel.[50] Meanwhile, the most prominent advocates of the latter are the neofunctionalists Stone Sweet and Brunell.[51] Both factions used an earlier version of the same database analysed here, but in support of opposing theories. It could be argued that the work of these scholars seeks to find a single uniting principle behind member-state governments' behaviour rather than to gain any enlightenment from their differences. Other quantitative studies of Member States' interactions with the Court include those of Golub,[52] Cichowski,[53] Kilroy,[54] Kelemen,[55] Nyikos,[56] and Alter;[57] these contributions were reviewed by Conant in 2007.[58] De la Mare and Donnelly's 2011 contribution to Craig and de Búrca's *The Evolution of EU Law* is a rare legalist contribution to empirical research.[59]

Recent quantitative work by the Centre for European Research at the University of Gothenburg (CERGU), based on a detailed analysis of the content of Member States' submissions, might be argued to bridge the gap between the political-science approach and legal analysis. However, it

[50] Geoffrey Garrett, R Daniel Kelemen and Heiner Schulz, 'The European Court of Justice, National Governments, and Legal Integration in the European Union' (1998) 52 International Organization 149; Carrubba, Gabel and Hankla (n 49); Clifford J Carrubba, Matthew Gabel and Charles Hankla, 'Understanding the Role of the European Court of Justice in European Integration' (2012) 106 APS Rev 214.

[51] Alec Stone Sweet and Thomas L Brunell, 'How the Legal System of the European Union Works - and Does Not Work: Response to Carrubba, Gabel, and Hankla Alec' [2010] The Selected Works of Alec Stone Sweet 1 <http://works.bepress.com/alec_stone_sweet/36> accessed 31 July 2020; Alec Stone Sweet and Thomas L Brunell, 'The European Court of Justice, State Noncompliance, and the Politics of Override' (2012) 106 APS Rev 204.

[52] Jonathan Golub, 'The Politics of Judicial Discretion: Rethinking Interactions between National Courts and the European Court of Justice' (1996) 19 West European Politics 360.

[53] Rachel A Cichowski, 'Integrating the Environment: The European Court and the Construction of Supranational Policy' (1998) 5 Journal of European Public Policy 387.

[54] Bernadette Ann Kilroy, 'Integration through the Law: ECJ and Governments in the EU' (PhD Thesis, UCLA 1999).

[55] R Daniel Kelemen, 'The Limits of Judicial Power: Trade-Environment Disputes in the GATT/WTO and the EU' (2001) 34 Comparative Political Studies 622.

[56] Stacy A Nyikos, 'Strategic Interaction among Courts within the Preliminary Reference Process – Stage 1: National Court Preemptive Opinions' (2006) 45 European Journal of Political Research 527.

[57] Karen J Alter and Laurence R Helfer, 'Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice' (2010) 64 International Organization 563.

[58] Conant (n 48).

[59] Thomas de la Mare and Catherine Donnelly, 'Preliminary Rulings and EU Legal Integration: Evolution and Stasis' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011).

confines itself to analysing the content of submissions in terms of 'more Europe' or 'less Europe'.[60] CERGU's results will be discussed in more detail later.

There is, however, a small cluster of studies reflecting a largely qualitative empirical approach. Chief among these is the work of Granger, quoted above, who has studied governments' participation strategies via questionnaires and interviews with Member States' legal agents. Another useful study is that of van Stralen at CERGU. Van Stralen makes a comparison of the litigation strategies of the governments of the Netherlands and Sweden, drawing in particular on the questionnaire filled in by Dutch government ministries when they decide whether to submit observations (see Appendix C).[61] These studies will be discussed later, but one point implied in Granger's methodology, and emphasised by van Stralen, might usefully be made here. Their enquiries have two, albeit overlapping, aspects: why do governments decide to devote resources to submitting observations to the Court of Justice (at all), and how do civil servants within those governments decide whether to submit observations to the Court of Justice (in a given case)?

Granger mainly attempts to answer the 'why' question. She makes a detailed analysis of the observations submitted by ten states between 1995 to 1999, noting that there were wide variations in the extent of their participation and offering persuasive reasons for the differences.[62] Granger's findings suggest that a Member State's degree of involvement with the Court reflects its government's attitude towards the EU—a complex phenomenon that again defies statistical analysis. She does, however, attempt to break it down, noting that governments vary in their motivations, strategies, policies and resources—financial and otherwise. These will be considered in sequence, bringing in other scholars' findings where appropriate.

Member States' motives in submitting observations to the Court

Granger suggests that there are three main types of motivation: the defence of national financial or strategic interests, the promotion of the government's view of Europe and the altruistic clarification of EU law. She discusses these motivations in terms of groups of states that emphasise these to different extents, arguing for instance that the UK exhibited all three, seeking

[60] Naurin and others (n 49); Olof Larsson and others, 'Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union' (2016) 50 Comparative Political Studies 879; Per Cramér and others, *See You in Luxembourg? EU Governments´ Observations Under the Preliminary Reference Procedure* (Swedish Institute of European Policy Studies 2016).

[61] Stralen (n 50).

[62] Marie-Pierre F Granger, 'When governments go to Luxembourg…the influence of governments on the Court of Justice' (2004) 29 ELR 1.

to promote a particular view of EU law both to defend national interests and to promote the government's view of how EU law should develop, but also out of an impulse to expound the law.[63] Because the bulk of Granger's qualitative survey was undertaken before the 2004 enlargement, not all of the Member States picked out for comparison above (Portugal vs Czechia, Poland vs Belgium and Sweden) are considered in her analysis. To summarise Granger's detailed exposition, she regards Portugal as being a state that makes submissions with the motive of promoting a particular view of EU law as well as that of defending its national legislation.[64] Granger's Belgian sources suggested that Belgium's prime motivation was the 'defence of national interests'.[65] Her Swedish respondents indicated that Sweden's policy was broader: the defence of 'national *or Community*' interest[s] … such as free trade, safe environment or transparency, or to explain the national law or system to the Court.'[66] Despite these different self-perceptions, the three states have similar rates of participation in the Court (Figure 15).

Within the scope of her survey, Granger did not have the opportunity for an in-depth discussion of the national characteristics and histories—the national identities—that form the background to Member States' motivations. Schmidt, in a more general discussion of states' attitudes to integration, says that'[n]ational identities, in the sense of national frames based on history, culture, and interests ... have a significant impact on how member states construct their identities in the EU'. She identifies four discourses about the EU—as a free market, a values-based community, a rights-based union, and a strategic global actor—which form the basis of the various states' attitudes to integration.[67] Schmidt focuses on Germany, France and the UK, describing the UK's approach as having been pragmatic, in that it evaluated the EU very much in terms of its promotion of free trade and security, and contrasts this with France's more ideological view of European integration. Germany, she argues, is—under Chancellor Merkel—in the process of moving from a normative view of the EU to a more pragmatic one based on national interest.

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[63] Granger, 'Governments in Luxembourg: How Do Governments Use EU Litigation to Protect National Policies or Influence EU Policy and Law-Making' (n 23) 12.

[64] Marie-Pierre F Granger, 'The Influence of Member States' Governments on Community Case Law: A Structurationist Perspective on the Influence of EU Governments in and on the Decision-Making Process of the European Court of Justice' (University of Exeter 2001) paras 2.1.1.8 and 2.1.2.1, fn 83.

[65] Granger (n 64) para 2.1.1.4.

[66] Granger (n 64) para 2.1.1.10 (emphasis added).

[67] Vivien A Schmidt, 'European Member State Elites' Diverging Visions of the European Union : Diverging Differently since the Economic Crisis and the Libyan Intervention?' (2012) 34 Journal of European Integration 169, 170.

It is possible to argue that, if states regarded their relationship with the EU solely in pragmatic terms, they would only be motivated to make observations with the intention of maintaining or improving their economic position. Alternatively, they might submit observations in cases that had no direct economic impact in an attempt to limit the EU's influence in those substantive areas of law and preserve their sovereignty; in the words of Larsson et al., to argue for 'less Europe'.[68] National sovereignty seems a less-than-pragmatic consideration, but (and this is an area where motivation is hard to separate from strategy) it could be argued that the preservation of sovereignty might be perceived as the preservation also of a Member State's long-term economic autonomy. Economically motivated legal arguments may, however, clash with those for the protection of national sovereignty.[69] Where motivations clash, a decision as to whether and how to intervene may be a strategic one, as will be seen in the next section.

Accepting for the moment Schmidt's opinion that the UK took a solely pragmatic view of its EU membership, its pattern of participation in the Court did not invariably seem to support either of these arguments. The UK's position on participation will be discussed in detail later, but the government's position, evidenced by Granger and reiterated in interviews undertaken in the course of this research, was that it was occasionally motivated by nothing more than a desire to clarify the law, with no apparent economic benefit.[70]

More generally, the overall pattern of intervention by the Member States in preliminary references—particularly in other states' cases—does not support the view that *most* states only submit observations if there is an economic benefit to doing so, although that may be the position of a minority. While there is a correlation between the level of intra-EU trade of a Member State and its number of submissions (Figure 13), it is difficult to distinguish between a state's greater financial ability to invest in influencing EU law in general from its having a financial stake in the outcomes of a higher proportion of the Court's cases.

It is helpful at this point to reiterate the distinction made above between a Member State's political decision to invest money and administrative capacity in making observations beyond the necessary minimum of cases referred by a national court—which may be motivated by an expectation of shorter- or longer-term economic advantage—and the decisions made by, usually, legally trained civil servants about whether to submit observations in a given case.

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[68] Naurin and others (n 49) 16; Larsson and others (n 61).

[69] See the *Nouvelles Frontières* case, Case C-209/84 *Asjes* EU:C:1986:188.

[70] Granger, 'Governments in Luxembourg: How Do Governments Use EU Litigation to Protect National Policies or Influence EU Policy and Law-Making' (n 23) 8.

The question, and perception, of Member States' motivations in submitting observations to the Court is not purely a matter of theoretical classification. In a talk given in 2014, Judge Arabadjiev (who shares Granger's threefold grouping of Member States' motives into the narrow defence of national interests, the promotion of national visions of 'what Europe is and where Europe should be heading' and acting as *amicus curiae*) said:

> It is obviously not for the Court to examine what motivated a Member State to intervene in a given case. Nevertheless, the perceived motivation of a Member State to intervene may play a role in the way its observations are likely to have an impact upon the Court … [I]n some cases—rare cases, I admit—Member States seek neither to defend a given national measure, nor to promote a particular national vision of Europe, but rather to help the Court and to act as its 'neutral', 'unbiased' advisors. This type of observations is particularly well regarded by the Court since they tend to bring into the debate purely legal arguments untainted by national interests.[71]

It is important to note that Arabadjiev is referring to the Court's perception of a Member State's motivations in the particular case, rather than of the political background to a Member State's participation in general.[72]

As examples of cases in which the UK government's observations were 'guided precisely by the idea that preliminary references offer an excellent opportunity for influencing the development of EU law and the way Europe is being constructed', Arabadjiev gives the cases of *O*, and *S and G*.[73] These cases originated in the Netherlands and concerned the much-litigated question of the citizenship rights of third-country nationals who are partners of EU citizens—in this case, whether movement between Member States for holidays was sufficient to cause Treaty provisions on EU citizenship to kick in. Judge Arabadjiev acknowledges that the UK government's long-term vision on this point was for a conservative reading of citizenship questions—not least because these cases formed part of a series that includes the UK cases of *Carpenter* and *McCarthy*.[74]

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[71] Alexander Arabadjiev, 'Influencing Luxembourg : UK Interventions in Preliminary Ruling Proceedings' (Speech given at University of Cambridge, 5 October 2014).

[72] Arabadjiev (n 72) 5.

[73] Case C-456/12 *O* EU:C:2014:135; Case C-457/12 *S and G* EU:C:2014:136.

[74] Case C-60/00 *Carpenter* EU:C:2002:434; Case C-434/09 *McCarthy* EU:C:2011:277.

Arabadjiev finally mentions a case in which he believes the UK government's legal arguments were purely neutral: *Melloni*, a Spanish case which concerned the, again much-litigated, question of whether a Member State could apply the standard of protection of fundamental rights guaranteed by its constitution when that standard was higher than that deriving from the EU Charter.[75] The UK argued in this case for the primacy of EU law. Sadly neither the Opinion nor the Court's judgment detailed the content of any of the nine contributions by member-state governments except insofar as they touch on admissibility.

Carnelutti also offers an example of neutral, or altruistic, observations in *Levin*,[76] in which both France and Italy set aside what appeared to be their national interests in favour of an expansive interpretation of free movement provisions.[77]

These cases illustrate the point that a Member State's motivation is not something that lends itself easily to *quantitative* investigation. The exercise of statistical analysis necessarily favours factors that are easy to measure and operationalise over those that are empirically testable only in a qualitative sense. Thus, considerations that a legal scholar would consider to be material may be disregarded, not because they are not theoretically informed, but because they are not susceptible to being quantified. Thus while the overall figures on Member States' participation in Court proceedings are relevant when considering their motives at a political level, an assessment of their day-to-day influence on the Court requires consideration of their purposes for making observations in individual cases. It is unfortunate that the specific content of states' legal arguments is difficult or impossible to obtain, but this may not always be necessary to be able to assess their motives. This will be returned to when looking at some individual Member States.

Strategic considerations governing the frequency of Member States' submissions to the Court

The Repeat Player strategy

As regards strategy, Granger observes that those governments that make use of the opportunity to influence EU law provided by participation in the preliminary reference process seek to gain the

[75] Case C-399/11 *Melloni* EU:C:2013:107.

[76] Case 53/81 *Levin v Staatssecretaris van Justitie* EU:C:1982:105.

[77] Aurore Carnelutti, 'The Role of Government Representatives in Article 177 References: The Experience of France' in Henry G Schermers and others (eds), *Article 177: Experiences and Problems - Asser Institute Colloquium on European Law* (TMC Asser Instituut 1987).

strategic advantages of being 'repeat players'.[78] The concept of repeat players—parties that use their greater experience of a legal process to obtain more favourable outcomes—was introduced in reference to courts in a 1974 paper by Galanter and can refer to any experienced litigants, from individuals to governments.[79] In the context of the Court of Justice, the repeat player concept seems first to have been applied to the Court of Justice by Mattli and Slaughter in 1996, concerning litigants displaying *tactical* behaviour. However, a government's decision to position itself as to be able to do this may be argued to be a long-term strategic decision.[80] De la Mare and Donnelly also observe that member-state governments may become repeat players by raising issues before national courts with the active intention of their giving rise to preliminary references.[81] By contrast, Lasser appears to imply that governments may achieve the status of repeat players not as a consequence of national strategy but because of their political clout, somewhat controversially describing repeat players as litigants 'whose very importance offers a certain practical assurance of the Court's interpretive good behaviour.'[82]

The UK is widely recognised to have been a repeat player; Granger notes that it was the second most frequent submitter of observations in the late 1990s (after France) and third (after the Netherlands and Germany) in the early 2000s. In the period after that covered in Granger's paper—and after the accession of Bulgaria and Romania—the UK remained the third most frequent participant with 315 submissions, after Germany (448) and Italy (381) (Table 2). Another state has joined the repeat players: Poland, now lying fifth with 282 but submitting observations at the highest rate of all. Czechia might also be considered a repeat player, with 226 interventions. Even Member States that submit relatively fewer observations, such as Denmark and Ireland (in thirteenth and sixteenth positions in recent years), may nonetheless be displaying the repeat player strategy by steadily intervening in other states' cases.

[78] Granger, 'When Governments Go to Luxembourg... the Influence of Governments on the Court of Justice' (n 50) 3.

[79] Marc Galanter, 'Why the " Haves" Come out Ahead : Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 165.

[80] Walter Mattli and Anne-Marie Slaughter, 'Constructing the European Community Legal System from the Ground up: The Role of Individual Litigants and National Courts' (1996) NYU Jean Monnet Working Papers 6/96.

[81] Thomas de la Mare and Catherine Donnelly, 'Preliminary Rulings and EU Legal Integration: Evolution and Stasis' in Paul Craig and Gráinne de Búrca (eds), The Evolution of EU Law (2nd edn, OUP 2011), 384.

[82] Mitchel de S O-l'E Lasser, *On Judicial Transparency, Control, and Accountability: A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP 2009) 319.

Some Member States have neither the experience of the Court nor the political weight to be described as repeat players. Some individual litigants, on the other hand, might be so described: companies within the animal feed group Denkavit, for example, have been parties in 24 cases that were referred for preliminary rulings between 1977 and 2009, demonstrating more experience of the Court than three of the Member States. They may be contrasted with interest groups, who seem to have seized the opportunity to challenge national public policies less than some models of European integration have expected.[83]

An alternative view of Member States' strategic considerations is that of Greer and Iniesta. They regard states as pursuing a strategy of risk management, in which they keep a watching brief on preliminary references and direct actions in order to identify domestic legislation that would be indefensible while being prepared to submit legal arguments to the Court if they think there is a chance of a decision that would save the national provision—and at the same time avoiding drawing attention to legislation that might provoke action from the Commission.[84] The points that need to be considered in pursuance of such a strategy are laid out explicitly in the interdepartmental checklist used by the government of the Netherlands to determine whether making an observation is desirable (Appendix C). It can be seen that the required analysis includes whether not just current, but anticipated, legislation would be affected by an upcoming case, whether the matter is politically sensitive, whether the Court's decision could limit departmental discretion, whether there are financial implications for the Netherlands and whether any of these considerations clash.

[83] Karen J Alter and Jeannette Vargas, 'Explaining Variation in the Use of European Litigation Strategies' (2000) 33 Comparative Political Studies 452, 478.

[84] Scott L Greer and Maria Martín de Almagro Iniesta, 'How Bureaucracies Listen to Courts: Bureaucratized Calculations and European Law' (2014) 39 Law and Social Inquiry 361.

Table 2

Total submissions in preliminary reference cases 2007-2013			
Germany	448	Finland	103
Italy	381	Ireland	100
UK	315	Sweden	89
Netherlands	311	Estonia	63
Poland	282	Latvia	45
Greece	263	Lithuania	43
France	261	Bulgaria	38
Austria	236	Slovakia	36
Belgium	227	Romania	32
Czech Republic	226	Cyprus	24
Spain	205	Luxembourg	14
Portugal	168	Slovenia	10
Denmark	118	Malta	8
Hungary	105		

Overall strategy towards EU legislation

Granger also observes that, as governments have come to have less control over the EU legislative process, the Court has become 'an increasingly attractive alternative forum to bear influence on law-making in the EU' and thus appearances before the Court may become part of Member States' overall legislative strategy.[85] Member States' view of court proceedings as one of the many aspects of EU decision-making that they might seek to control will be discussed in Chapter 7.

In summary, one explanation for the frequency with which some Member States make submissions in cases before the Court is that they are deliberately pursuing a strategy of positioning themselves as experienced litigants and partners of the Court. This improves their success-rate in litigation and as part of a multilevel approach to influencing EU legislation.

[85] Granger, 'States as Successful Litigants before the European Court Of Justice: Lessons from the "Repeat Players" of European Litigation' (n 27) 37.

Policy considerations governing the frequency of Member States' submissions to the Court

The issue of the effect that member-state governments' policies may have on their interactions with the Court of Justice is obviously too extensive for the scope of this thesis. What can be done here is to mention some aspects of government policy that have been argued to influence states' participation. In this context, it is hard to separate government behaviour that is the result of a government's policy towards the EU from behaviour that is the consequence of its constitutional arrangements and variety of capitalism. It should also be emphasised that the structures and procedures with which states manage their relationships with the EU are still, to some extent, subject to *political* change.

Governments' participation policies have varied over time and are dependent on the policy areas under consideration by the Court. Participation rates can be regarded as a measure of the salience of each policy area to the particular Member State. It is possible to look at the relative participation rates of Member States in two ways. Firstly, the total number of submissions to the Court made by each Member State over the life of the EU could be regarded as a measure of the cumulative influence each state has had over a substantive area of EU law. To the extent that it measures the amount of influence a country has tried to have, it is an approximate indication of the political and economic importance of each subject to the Member State. Secondly—and a better measure of the salience of each subject area to Member States—is the number of submissions *per year of membership* made by each state: its submission rate. In cases on agriculture, for example, Italy made both the largest number of submissions over the period from 1973 to 2013 and the most observations per year of membership. Contrast cases on freedom of services and establishment, where the Member State with the highest number of submissions is Germany, but the highest submission *rate* is by Austria.

Different Member States' contributions via the submission of observations to the main subject areas of EU law—agriculture, the four freedoms, the environment, tax and so-on—were surveyed during this research but are not detailed here. However, some trends may be mentioned.

To deal with submission rates in the most frequent subject areas one at a time, Italy—as noted—dominated submissions in agriculture cases, followed by Greece, France, the UK, Germany and Poland. The UK and France had the highest submission rates in free movement of goods cases, followed by Czechia and Italy. Cases on the freedom of services and establishment saw the highest levels of participation from Austria, followed by Czechia and Poland; it is probably

significant that the most active participants were newer Member States that might wish to expand their services sectors into other states. Austria was also the most frequent participator in freedom of movement of workers cases, followed by the UK and Germany. Poland had the highest submission rate in competition cases, followed by France and Italy. The UK dominated cases on social policy with over twice the submission rate of the next nearest states, Austria and Germany. Austria, the UK and the Netherlands participated most frequently in cases on social security. Poland dominated tax cases, followed by the UK and Germany. The biggest contributor in environment cases was Austria, then Poland and the UK (surprisingly, the Scandinavian countries were only 8th, 9th and 12th).

These figures conceal fluctuations over the period, but the dominance of older Member States suggests that these figures tell only part of the story. It is difficult to believe that agriculture policy, for instance, is less critical to Romania (which has the most agricultural holdings in the EU) than Italy (with the second most).[86] Again, wealth and organisational resources are confounding factors: it is possible to say that states' intervention rates are affected by the importance of different policy areas to each state, but not that they are indicative of an issue's relative salience to *different* Member States. Neither do these figures indicate each issue's relative importance for any given Member State, because they are not corrected for the number of cases in which each topic is raised. Member States' submission rates relative to the number of cases in each area *will* be indicative of their areas of interest and will be considered later for selected Member States.

State intervention policy is also influenced by more complex constitutional and historical factors. Granger suggests that the founding Member States' relatively slow start in taking part in Court proceedings can be attributed to their lack of understanding of the Court's reasoning process, itself the consequence of 'a…still persistent…continental belief in Montesquieu's myth portraying the judge as the "mouth of the law" and therefore incapable of influencing its formation'.[87] Thus, she argues, the civil law Member States were slow to see case law as influencing legal development and initially failed to pursue a policy of intervention. But, while this is an attractive explanation of the late start in general, matters are not that simple at the level

[86] 2010 figures from Eurostat <http://ec.europa.eu/eurostat/statistics-explained/index.php/Agricultural_census_in_Italy> accessed 5 July 2016.

[87] Granger, 'States as Successful Litigants before the European Court Of Justice: Lessons from the "Repeat Players" of European Litigation' (n 27) 36, quoting Montesquieu, 'Mais les juges de la nation ne sont … que la bouche qui prononce les paroles de la loi ; des êtres inanimés, qui n'en peuvent modérer ni la force ni la rigueur.' L'ésprit des lois (first published 1748) XI, VI.

of individual Member States. There was more variation in participation rates among the civil law countries—say between Germany and France in the period before the first enlargement—than between France and the UK in the period from 1973 to 1975 and even more between the UK and Ireland in the same period.

Lasser observes that the French legal system was unfamiliar with the degree of public argumentation displayed by the Court of Justice.[88] It might be argued that this made France particularly slow to take advantage of the opportunity to influence the Court's decision-making. Although the concise style of early Court decisions was very French, the court procedure was not, and the chance that it offered for non-parties to intervene was far from French tradition.[89] Thus the French government was slow to form a policy of intervening.

An aspect of government policy that affects states' interaction with the Court is the extent to which government departments are primed to *listen* to the Court: the extent to which they 'pay attention, lobby and comply'.[90] It will be seen that the UK, in particular, recognised the importance of paying attention to cases coming before the Court and their policy implications. Greer and Iniesta note that those bureaucracies which have a policy of keeping a listening watch on the Court are not just better placed to argue their positions before the Court in ongoing cases but also to adjust their domestic practices to avoid litigation in the future.[91]

Another possible source of differences between the civil law countries might be found in their constitutional traditions as regards the law. Wind notes that national policy towards participation in EU legal proceedings is affected by states' receptivity to supranational rules and institutions in general, and hence by each state's form of democracy.[92] Although there may be a common origin to the legal traditions of the civil-law Member States, there is no one pattern of implementation. Instead, comparative law recognises three traditions within the civil law Member States of the

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[88] Mitchel de S O-l'E Lasser, 'The European Union: Discursive Bifurcation Revisited', *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (2009) 319.

[89] Alan Dashwood, 'The Advocate General in the Court of Justice of the European Communities' (1982) 2 Legal Studies 202, 214; Nial Fennelly, 'Legal Interpretation at the European Court of Justice' (1996) 20 Fordham International Law Journal 656, 661.

[90] Greer and Martín de Almagro Iniesta (n 85) 361.

[91] Greer and Martín de Almagro Iniesta (n 85) 367.

[92] Marlene Wind, Dorte Sindbjerg Martinsen and Gabriel Pons Rotger, 'The Uneven Legal Push for Europe: Questioning Variation When National Courts Go to Europe' (2009) 10 European Union Politics 63; Marlene Wind, 'Denmark – a Reluctant European?' (UACES conference: 40 Years since the First Enlargement, London, March 2013).

EU—French, German and Scandinavian civil law—and this distinction looks to be an intriguing possible source of variation.[93]

Scandinavian constitutional tradition—majoritarian and suspicious of judicial review—offers a useful hypothesis as to why the Scandinavian countries are faithful implementers of EU law but have a low frequency of intervention. Denmark, in particular, is said to have a policy of submitting intended preliminary references to executive scrutiny.[94] Wind concentrates on the states she classifies as majoritarian democracies, noting that judicial review of primary legislation is almost unheard of in Denmark and Sweden, was illegal in Finland until 2000 and is still domestically unavailable in the UK. She argues that policy considerations and constitutional traditions have kept this as the status quo in Scandinavian countries, while in the UK, the preliminary reference procedure empowered the courts in the face of parliamentary sovereignty.[95] Wind's detailed analysis centres on referral rates rather than the submission of observations, so she does not question how it is that the UK developed a policy of frequent intervention despite this constitutional tradition.

Several authors' reflections on differentiated European integration may also point to the effect of constitutional tradition on Member States' policy towards EU law and the Court. Schimmelfennig and Winzer, for instance, analyse European integration in terms of actual differences in the legal rules applied to states, such as the UK and Irish opt-outs on the Schengen zone and the AFSJ. They regard such 'constitutional differentiation' as mirroring real distinctions in states' attitudes to European integration, which they attribute to different concerns about national sovereignty and identity. Jachtenfuchs and Kraft-Kasack stress the importance of the 'federal balance' between different levels of government—in this case between the Member States and the EU—arguing that each state establishes a pattern of shared decision-making between the levels.[96] This pattern, which includes the interaction between member-state ministries and the Court of Justice, can be argued to be an aspect of both a state's constitutional arrangements and its government policy.

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[93] Francesca Bignami, 'Rethinking the Legal Foundations of the European Constitutional Order: The Lessons of the New Historical Research' (2013) 28 APS Rev 1311; Jens Elo Rytter and Marlene Wind, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms' (2011) 9 International Journal of Constitutional Law 470.

[94] Rytter and Wind (n 94).

[95] Wind, Martinsen and Rotger (n 93) 77.

[96] Markus Jachtenfuchs and Christiane Kraft-Kasack, 'Balancing Unity and Diversity: Exit and Voice in the EU and in Federal Systems (13th Biennial Conference of the EUSA, Baltimore, May 9-11)' (2013).

Jachtenfuchs and Kraft-Kasack's paper uses another concept, first applied to EU law by Weiler: that of Exit and Voice.[97] Voice is represented by a Member State's expression of its policies to the EU, including via the Court. What balance a Member State may choose to maintain between Exit and Voice is very much a matter of policy, both of longer-term national policy that stems from a country's history and constitution, and of the policy preferences of the government in power at any one time. The expression of national policy need not be described in these terms; as has been noted, academics working in Europeanisation theory do not necessarily use Weiler's model, instead referring to the uploading of domestic policies to the EU and the downloading of EU policy to the Member States.[98]

Sources of variation – resources

States' levels of participation demonstrate the policy preoccupations of the Member States and indicate the extent to which they might influence the legal evolution of the Court's jurisprudence. All things being equal, the variations would depend entirely upon motivation, strategy and the importance that each state ascribes to different policy areas. The matter of resources, however, cannot be neglected: in summary, wealthier and larger countries interact more with the Court, but the relationship is not strong for the smaller and poorer states. The variation among this group can be attributed to a relative scarcity of the organisational, procedural and judicial resources needed for full participation in Court proceedings.

Granger discusses national variations in these less tangible assets in some detail, concluding that these factors are critical but difficult to assess. She divides such assets, which she describes as 'governments' unequal endowment' into three not-entirely-distinct categories: human resources, organisational features and procedural resources.[99] The human resources available to a member-state government include not just lawyers and civil servants, but their training and experience. Training, in particular, differs both within and between groups of Member States of varying length of membership. Many senior lawyers and civil servants of the Eastern European members of the 2004 enlargement were trained under Soviet judicial regimes, which themselves were far from uniform. The degree to which this affected current attitudes towards the EU legal system

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[97] Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 Yale LJ 2403, applying the concepts of Albert O Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (Harvard University Press 1970).

[98] Vivien A Schmidt, 'The European Union and National Institutions', Democracy in Europe: The EU and National Polities (OUP 2006).

[99] Granger, 'When Governments Go to Luxembourg... the Influence of Governments on the Court of Justice' (n 50) 15.

and supranational review would be an interesting subject for research. Meanwhile, their younger colleagues entered the law at a time of transition, some having been trained in other Member States or via schemes such as the British Law Centre in Warsaw.[100] This again contributes a degree of unevenness in training.

Several authors note wide variations in the judiciaries of the Member States[101] and the amount of money devoted to national judicial systems.[102] These differences affect both courts' readiness to refer cases to the Court of Justice and a Member State's ability to react to notifications from the Court Registry and assemble appropriate observations.

This effect can be illustrated by considering the experience of Portugal. Despite joining the EU in 1986, Portugal was slow to develop a practice of submitting observations in other states' cases. In the decade from 1986 to 1995, it submitted observations in all of its own cases but only in 0.7% (1995) to 7.3% (1987) of those originating in other Member States – an average of 3.3% across the decade. 1996 was the lowest year, with only one observation submitted in the 157 non-Portuguese cases (0.6%). Across the following decade, the number of submissions rose slightly to an average of 5.6%. From 2007 onwards, there is evidence of a more targeted strategy, with fewer observations in Portuguese cases while the percentage of observations in other states' cases rose to a peak of 11.2% in 2011. Judge da Cruz Vilaça explained that he and others, concerned at Portugal's low level of interaction with the Court, had put together a network of EU law academics in Portugal who could monitor upcoming cases, inform the government if they felt that Portugal could usefully intervene, and draft outline legal arguments to present to the Court.[103] Thus a task usually performed by civil servants has, in the absence of government coordination, devolved upon the judiciary and academics.

Granger's last category of less tangible resources is that of procedural resources, which she describes as pertaining to 'decision-making on the opportuneness and content of observations.'[104]

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[100] E.g. members of the Court of Justice Michal Bobek and Maciej Szpunar; <https://britishlawcentre.co.uk/> accessed 31 July 2020.

[101] John Bell, *Judiciaries within Europe: A Comparative Review* (CUP 2006); Maartje de Visser and Monica Claes, 'Courts United? On European Judicial Networks' in Antoine Vauchez and Bruno de Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Hart 2013); European Commission, 'European Judicial Training' (2012) 4; European Commission for the Efficiency of Justice (CEPEJ) 292.

[102] European Commission for the Efficiency of Justice (CEPEJ) (n 102).

[103] Conversation with JL da Cruz Vilaça, 5 October 2014.

[104] Granger, 'When Governments Go to Luxembourg... the Influence of Governments on the Court of Justice' (n 50) 16.

This includes the ability of government departments to work together to coordinate their responses to upcoming cases. It also relates to low-level policy, insofar as governments have to have a plan about what to do if two government departments disagree. Such disagreement may be about the implications of a legal provision, in which case it is important for there to be a sufficient level of coordination for an expert opinion to be sought and the content of the observations finalised within the short time-frame available. More critically, two departments may disagree upon their policy goals. In the UK, a central government department would attempt to negotiate a solution.[105] If the ministries' differences were irreconcilable, the UK did not submit observations in the case.[106] In Germany, however, although there is a single department with overall responsibility for coordinating the government's response to preliminary references,[107] the current procedure is that if ministries disagree, there will automatically be no brief submitted by the government.[108] Historically, this was not always the case; Davies notes that in *Van Gend* there was both furious disagreement between the German ministries, and between the junior officials who wrote Germany's submission and their political seniors who favoured the principle of direct effect.[109] Granger notes that in some Member States, cabinet approval is required before observations are submitted, either where there is such a disagreement between departments (Sweden, the Netherlands and France) or invariably (Denmark and Luxembourg).[110] In the latter case, having to seek such approval (or appeal to the cabinet as a referee) must make meeting the deadline for written observations very challenging.

There is not just potential for disagreement between government departments about the appropriate content for observations, but between different levels of government within federal or devolved systems. Granger observes that the use of a cabinet-level decision as a tie-breaker in

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[105] Simon Bulmer and Martin Burch, *The Europeanisation of Whitehall: UK Central Government and the European Union* (Manchester University Press 2009) ch 5; UK observations are coordinated by the EU Litigation Unit, and disagreements refereed by the Legal Advisers' team, both within the Treasury Solicitor's Department of the Cabinet Office.

[106] Conversation with Shasa Bezhadi-Spencer, then Joint Head of EU Litigation at Treasury Solicitor's Department (23 July 2014).

[107] The Federal Ministry for Economic Affairs and Energy < http://www.bmwi.de/EN/Topics/Europe/centre-of-excellence.html> accessed 31 July 2020.

[108] Ariane Wiedmann, Federal Ministry for Economic Affairs and Energy, Germany, 'Litigation before the Court of Justice of the European Union from the Perspective of the Federal Republic of Germany' (unpublished seminar at University of Cambridge 30th October 2013).

[109] Bill Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949-1979* (CUP 2012) 158.

[110] Granger, 'When Governments Go to Luxembourg... the Influence of Governments on the Court of Justice' (n 50) 17.

disputes could not operate in federal systems such as Germany and Belgium. The situation was different in the devolved structure of the UK. A devolved administration could only participate directly in proceedings before the Court if it was a party to the case from which the referral stemmed. If a devolved administration wished to comment in a preliminary reference, it had to persuade the EU Litigation Unit of the need for the UK government to take the case.[111] This had the advantage of using the central government's greater expertise but could be unhelpful if a situation arose in which the devolved administration and the UK government were in disagreement.

The detailed consideration of whether to submit observations, and what to include, may be less or more formalised. The comprehensive checklist used in the Netherlands is both illuminating and evidence of perhaps the most formal procedure. In other Member States, the system may differ from ministry to ministry, as van Stralen finds to be the situation in Sweden.[112] This appears to have been the case in the UK, which Bulmer and Burch identify as a weakness.[113] Some departments may, however, have robust procedures for identifying cases of importance and may harness the power of non-governmental sources. In the UK, for instance, the Intellectual Property Office identified upcoming cases on IP matters and solicited comments and suggestions from the members of a mailing list consisting of practitioners and academics.[114] This was a useful *supplementary* procedure, as opposed to Portugal's use of a network of academics in default of action by government departments.

Conclusion

This chapter has examined the wide variation in Member States' use of their opportunity to take part in proceedings at the Court of Justice. Authors have offered several explanations, but it could be argued that the causes could only fully be characterised with respect to each Member State

[111] Deputy Prime Minister's Office, 'Devolution: Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee' (Cmd 5240, 2001) B4.24; Scottish Government, 'Direct Actions and Preliminary References: Guidance for Devolved Administrations When Considering Bringing Direct Action before the European Court of Justice' (2011) Guidance E 3 <http://www.gov.scot/Topics/International/Europe/Our-Focus/UK-Gov/GuidanceECJ>..

[112] Stralen (n 50) 33.

[113] Simon Bulmer and Martin Burch, *The Europeanisation of Whitehall: UK Central Government and the European Union* (Manchester University Press 2013) ch 5.

[114] Intellectual Property Office, 'Intellectual Property – Notice: References to the Court of Justice of the European Union' (2016) < https://www.gov.uk/government/publications/references-to-the-court-of-justice-of-the-european-union> accessed 31 July 2020.

individually, contingent as they are on unique politico-economic, constitutional, historical and contextual factors. Nevertheless, some patterns can be observed. Economic factors are of importance in determining what resources a Member State can deploy to defend its national interests and influence EU law via the Court of Justice. However, governments with similar levels of wealth may differ in their policies towards the EU, in their strategies for influencing EU law and in their organisational and procedural resources. It is important to recognise that the resources, financial or otherwise, that are available to a state for making observations at the Court of Justice are not immutable, but to a significant extent a matter of choice based on the degree of influence a state seeks to have.

These factors and choices will be examined with regard to Denmark, Ireland and the UK in Chapter 6. Before this, Chapters 4 and 5 will consider the benefits that may accrue not just to a Member State but to the Court of Justice from states' observations.

Table 3 GDP nominal and per-capita index

Member State	GDP nominal ($bn)	GDP per capita index (EU28 = 100) 2013	Member State	GDP nominal ($bn)	GDP per capita index (EU28 = 100) 2013
Belgium	507	120	Sweden	552	124
France	2,739	108	Cyprus	22	84
Germany	3,593	124	Czech Republic	199	83
Italy	2,068	98	Estonia	24	75
Luxembourg	61	264	Hungary	131	66
Netherlands	801	132	Latvia	30	62
Denmark	324	126	Lithuania	47	73
Ireland	221	131	Malta	9	86
UK	2,490	108	Poland	514	67
Greece	243	74	Slovakia	97	76
Portugal	219	77	Slovenia	47	80
Spain	1,356	91	Bulgaria	54	46
Austria	418	131	Romania	184	54
Finland	260	113			

Chapter 4: Taxonomy and conceptual framework - the benefit of observations to the Court

Introduction

The previous chapter concentrated on the reasons for national variations in the extent to which the Member States invest resources in submitting their observations to the Court of Justice. Before those reasons are brought together, it will be useful to look at observations from the point of view of the Court: that is, whether and how the Court makes use of Member States' observations.

Since the establishment of the Court of Justice of the European Coal and Steel Community, the rules of procedure have included a provision for the Member States to provide written observations.[1] The Notes for the Guidance of Counsel issued by the Registry of the Court of Justice make it clear that these observations are intended to be functional.

> The purpose of the written observations is to suggest the answers which the Court should give to the questions referred to it, and to set out succinctly, but completely, the reasoning on which those answers are based. It is important to bring to the attention of the Court the factual circumstances of the case before the national court and the relevant provisions of the national legislation at issue.[2]

The Notes state that the purpose of oral testimony is to clarify issues, allow further exploration of points that the Court feels were not adequately covered and to enable the Member States to respond to each other's written observations, even if they did not take part in the written procedure. The Notes emphasise that oral arguments acquire a greater significance in the expedited procedure, where the opportunity for written submissions is limited.[3]

This matter-of-fact statement of the purposes of observations stands in marked contrast with the intentions attributed to them by some schools of thought. It is important to stress that the Court of Justice, as Larsson expresses it, 'routinely carries out the task allocated to it, i.e. the solution of

[1] Rules of Procedure of the Court of Justice of the ECSC (1974) Art 103.

[2] Registry of the Court of Justice of the European Communities, *Notes for the Guidance of Counsel* (Court of Justice of the European Communities 2009) s 9.

[3] Registry of the Court of Justice of the European Communities (n 2) 18.

legal conflicts that have arisen within the EU, without provoking either conflict with the other branches of government, or leaps towards further European integration.'[4] In other words, it can be argued that the majority of cases do not have broader implications than their immediate subject-matter, and neither do Member States' observations in those cases. Most interventions merely serve the purpose envisaged since the Court's inception and not as an opportunity for political leverage.[5] Member States are expected to explain their national rules and to provide information that is useful to the Court—and also to make clear their preferred positions on the questions referred. Such procedures put the Member States on an equal footing with the institutions from which EU legal provisions emanate; those institutions are allowed to respond to a request for clarification or a challenge to EU rules, and the Member States to do the same for their national provisions. The fact that the Court may make specific requests for information underlines this.

The assumption that underlies academic discussion of member-state governments' motives in making observations is that the Court of Justice takes account of Member States' arguments. This assumption encompasses three different situations: first, where the Court makes use of the information provided to it in answer to specific questions; second (but closely related), where the Court makes use of unsolicited factual and contextual information related to the case, and third, where the Court takes account of unsolicited *arguments* from Member States, whether about national or EU law, or matters of jurisdiction and admissibility.

The first two assumptions seem straightforward. The Court Registry's *Notes for the Guidance of Counsel* indicate that such contributions are welcomed.[6] The Court not infrequently refers in its judgments to national governments' submissions that clarify national law,[7] and it can be argued that the information provided may be of use to the Court even if it is not explicitly cited—if it merely confirms the Court's understanding, for instance. The position concerning clarifications of fact is somewhat more problematic since the Court has indicated that it feels bound to accept the facts as they are laid out in the order for reference; as Broberg and Fenger discuss, clarifications

[4] Olof Larsson, 'Minoritarian Activism: Judicial Politics in the European Union' (PhD Thesis, University of Gothenburg 2015) 9.

[5] Indeed, Articles 41 and 41* of the Treaty establishing the European Coal and Steel Community (1951) provided for similar intervention, although preliminary references under that Treaty were limited in scope to ruling upon the validity of acts of the High Authority and of the Council, with no overt interpretative function.

[6] Registry of the Court of Justice of the European Communities (n 2) s 9.

[7] See e.g. Case 33/88 *Allué* EU:C:1989:222, para 12; Case C-224/02 *Pusa* EU:C:2004:273, para 36; Case C-40/05 *Lyyski* EU:C:2007:10, para 44; Case C-64/08 *Engelmann* EU:C:2010:506, para 41.

may be accepted but revisions may not.[8] Nevertheless, such contributions are debated, even if they are eventually rejected.[9]

The third assumption, that the Court is influenced by Member States' legal reasoning to reach certain conclusions (whether by force of legal argument or by political threat) is more challenging to assess. Firstly, the same problem arises as in studies of whether Advocate Generals' Opinions influence the Court. It is difficult to distinguish the situation in which the Court is persuaded to reach a decision that it would not otherwise have done, from that in which it independently arrives at the same decision.[10] Assuming for the moment that the Court *is* so persuaded, the second problem is that of distinguishing between possible methods of persuasion. Do member-state governments sway the Court via political pressure or by the force of their legal argumentation? Researchers are divided on this question, typically but not exclusively on the basis of academic discipline. The hypothesis that, in what Lupu calls 'an uncertain compliance environment',[11] Member States exert pressure on the Court to achieve a 'strategic accommodation of national interests',[12] finds its main home among political scientists, particularly those that characterise the EU as an intergovernmental organisation.[13] Carrubba et al., for instance, suggest that 'When a court hears a case involving the interests of those controlling the executive and legislative institutions [of Member States], those interests can threaten to obstruct the court's intended outcome.'[14] This encompasses some debatable suppositions: that the Court *has* an ex-ante intended outcome; that it allows political, as well as legal, considerations to inform its judgments; that governments are single entities that speak with one voice; and that

[8] Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (OUP 2014) ch 103.3.3.

[9] See e.g. Case 99/83 *Fioravanti* EU:C:1984:360, para 10.

[10] Alan Dashwood, 'The Advocate General in the Court of Justice of the European Communities' (1982) 2 Legal Studies 202, 211; Takis Tridimas, 'The Role of the Advocate General In the Development of Community Law: Some Reflections' (1997) 34 CMLR 1349, 1362; Albertina Albors-Llorens, 'Securing Trust in the Court Of Justice of the EU: The Influence of the Advocates General' (2012) 14 Cambridge Yearbook of European Legal Studies 509; Carlos Arrebola, Ana Julia Mauricio and Héctor Jiménez Portilla, 'An Econometric Analysis of the Influence of the Advocate General on the Court of Justice of the European Union' (Legal Studies Research Paper Series 3/2016) (2016).

[11] Yonatan Lupu and Erik Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2012) 42 British Journal of Political Science 413, 414.

[12] Lisa Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2002).

[13] See also Karen J Alter, *The European Court's Political Power: Selected Essays* (OUP 2009); Mark Dawson, Bruno de Witte and Elise Muir, *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013).

[14] Clifford J Carrubba, Matthew Gabel and Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 APS Rev 435.

governments' contributions to the Court's proceedings are in some sense unwelcome external interventions.

An alternative view is that the Court is persuaded to reach certain conclusions by the quality of Member States' legal arguments. It can be argued that this view is supported by evidence that the Court benefits from member-state governments' observations in several ways that cannot be accommodated within a simple political-pressure model. These ways will be discussed below, but it should be made clear at this point that there is no intention of suggesting that Member States' influence can only be characterised as legal persuasion *or* political pressure. There is no reason why there should not be elements of both; as Cramér says, member-state governments' observations 'counsel, guide, or, perhaps, push the CJEU.'[15] What will be argued is that acknowledging only Member States' inclination to push is, at best, a gross oversimplification of both Member States' intentions and the effect on the Court of their observations.

The dual utility of member-state governments' observations—both to indicate political realities and to convey legal arguments—is discussed with respect to two formal models of the interaction between member-state governments and the Court of Justice in Chapter 7. In addition to these two elements, however, there is one further effect of Member States' interventions: the mere arrival of written observations in a case may influence the Court in its assessment of the procedural treatment that the case requires, as will be seen below.

The usefulness of Member States' observations to the Court

The ways in which member-state governments' observations might be of use to the Court can be divided into eight categories:

1. the provision of factual information
2. the clarification of political implications
3. the clarification of issues of national identity
4. 'sounding out' Member States' reactions to envisioned legal changes;
5. the identification of the legal principles governing a case, including any broader legal implications
6. identifying points of disagreement between the Member States to press for more European integration

[15] Per Cramér and others, *See You in Luxembourg? EU Governments´ Observations Under the Preliminary Reference Procedure* (Swedish Institute of European Policy Studies 2016).

7. assisting in case management
8. improving the Court's legitimacy and status in the Member States

1. The provision of factual information

As noted above, the Court Registry's *Notes for the Guidance of Counsel* make clear that observations are intended to set out the factual circumstances of the case before the national court, and the relevant national legislation.[16] As Arabadjiev notes, 'a good submission [helps] the Court get a fuller picture of the facts of the case and the applicable national law'.[17] Member State submissions regarding national provisions not only assist the Court in reaching its conclusions but may, as Broberg and Fenger point out, help the Court give 'a precise judgment that avoids examining hypothetical issues.'[18]

In the most straightforward situation, Member States are conveying neutral facts rather than expressing an opinion. However, as Broberg and Fenger point out, even statements of fact and national law may not be genuinely disinterested but must be assessed with an eye to the possibility of 'spin'.[19] A case which does not raise any general issue of principle may, after all, have the potential to deprive a government of revenue or require national legislation to be altered, not necessarily only in the country of origin of the reference. Larsson and Naurin give the example of *Imexpo Trading*,[20] which turned on which of two customs tariff headings should be used for plastic chair-mats.[21] The potential cost to Imexpo—and benefit to the Danish exchequer—was the difference between 8.9% and 0% customs duty.[22] The Danish government's observations, as recounted in the Report for the Hearing, merely supported the former

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[16] Bill Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949-1979* (OUP 2012).

[17] Alexander Arabadjiev, 'Influencing Luxembourg : UK Interventions in Preliminary Ruling Proceedings' (Speech given at University of Cambridge, 5 October 2014) 4.

[18] Broberg and Fenger (n 8) 349. A submission may also attempt to *raise* hypothetical issues; see, for instance, AG Geelhoed's comments on the UK's observations in *Test Claimants in the FII Group Litigation*, in which he rejected the UK's introduction of a new argument at the oral hearing as conjectural (Case C-446/04 *Test Claimants in the FII Group Litigation* EU:C:2006:240, Opinion of AG Geelhoed, paras 142-147).

[19] Broberg and Fenger (n 8) 349.

[20] Case C-379/02 *Imexpo Trading* EU:C:2004:595.

[21] Daniel Naurin, Per Cramér, Olof Larsson, Sara Lyons, Andreas Moberg and Allison Östlund, 'Coding observations of the Member States and judgments of the Court of Justice of the EU under the preliminary reference procedure 1997-2008 Data report' (2013) CERGU Working Paper Series 2013:1 <http://cergu.gu.se/digitalAssets/1438/1438554_2013-1.pdf> accessed 31 July 2020.

[22] See also Case C-338/95 *Wiener v Hauptzollamt Emmerich* EU:C:1997:552 in which the Court, somewhat reluctantly, ruled on the characteristics of a nightdress.

classification, while the legal aspects were confined to considering how to classify items that could fall into either of two headings.

Imexpo illustrates a feature of many preliminary references: that they involve technical matters concerning which the Court cannot be expected to have pre-existing expertise. A similar case in the same year, *DFDS*, found the Court examining line-drawings of different kinds of tipper truck; earlier *Van Sillevoldt* had them considering the dimensions of broken rice-grains.[23] In *Sayn-Wittgenstein*, member-state governments explained national naming customs.[24] In such cases, Member States' submissions may supplement those of the Commission in providing necessary factual analysis for the Court. Submissions from Member States may also give the Court (including the Advocate General) a head start in terms of comparative analysis; indeed, as Carnelutti observes, the Court may at times request comparative material from a Member State that has *not* sent written observations.[25]

There is a subtle distinction to be borne in mind here, which is that the Court may request clarification of specific facts to allow it to draw conclusions, but it must not—in principle, at least—challenge the facts provided in the order for reference. The determination of the veracity of these facts is a matter for the national court alone.[26] In practice, these situations can be difficult to distinguish.

Another circumstance in which the Court may ask for information is where there is a question over the admissibility of the reference: see, for example, AG Tizzano's Opinion in *Bacardi-Martini*.[27] This is discussed further in section 5.

The benefit to the Court of receiving Member States' observations of fact, in terms of labour-saving and technical knowhow, should not be underestimated. Arguably, such circumstances are as close to 'neutral' as is possible while still motivating governments to make any observations at all.

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[23] Case C-396/02 *DFDS* EU:C:2004:536 ; Case C-159/88 *Van Sillevoldt* EU:C:1990:232.

[24] Case C-208/09 *Sayn-Wittgenstein* EU:C:2010:608, Opinion of AG Sharpston, particularly para 70.

[25] A Carnelutti, 'The Role of Government Representatives in Article 177 References: The Experience of France' in Henry G Schermers and others (eds), *Article 177: Experiences and Problems - Asser Institute Colloquium on European Law* (TMC Asser Instituut 1987) 237.

[26] See e.g. Case 104/77 *Oehlschläger v Hauptzollamt Emmerich* EU:C:1978:69, para 4.

[27] Case C-318/00 *Bacardi-Martini* EU:C:2003:41, para 19.

2. The clarification of political implications

Although several authors suggest that it is the Commission, rather than the Member States themselves, that conveys Member States' political preferences to the Court, it is clear that Member States' submissions may seek to convey the possible political consequences of the Court's decisions. A conventional view is that courts take no account of politics. They are held to decide a case on purely legal grounds and, if this produces an unpopular or unfair result, to insist that politics and legal reform are matters for the legislature. This principle could be argued, however, to take the form of the Court not allowing the political consequences of a decision to be its *primary* consideration. In rare cases, the Court has been unable to escape the socio-political consequences that flow from its decisions. Referring to the line of cases that balanced free movement against labour rights, from *Mazzoleni* through *Laval* and *Viking*, Judge von Danwitz said, 'There was also a political compromise, which the CJEU had to consider… [which consisted of] a balancing of interests between new and old Member States.'[28] Such overt balancing of the political priorities of Member States is nevertheless the exception.

Less blatant political considerations can be identified. Firstly, the propensity of technical questions to raise related questions of constitutional principle is one of the joys of studying EU law, and it can hardly be said that a case with constitutional implications is apolitical. Secondly, although the Court may not usually consider politics in the strict sense, it certainly takes into account *policy*, primarily where there are explicit references to public policy exceptions in EU legislation, but also as being (hypothetically) capable of being subject to general principles of EU law. Reed also notes that whenever the judges choose to limit the retroactive effect of a ruling, they implicitly recognise the political implications of their decisions at both EU and national levels.[29]

The circumstances under which national policy may be considered were discussed in the Opinion in *Gazprom*, in which AG Wathelet says:

> According to Advocate General Kokott, the Court's case-law implies that the concept of public policy 'protects *legal interests*, or in any event *interests expressed in a rule*

[28] Case C-165/98 *Mazzoleni* EU:C:2001:162; Case C-341/05 *Laval* EU:C:2007:809; Case C-438/05 *Viking* EU:C:2007:772; Thomas von Danwitz, 'Der EuGH und das (Un)Soziale Europa – "Kritik ist nicht berechtigt"' *Die Tageszeitung* (Berlin, 12 September 2008) (translated in Larsson (n 4) 35.

[29] JWR Reed, 'Political Review of the European Court of Justice and Its Jurisprudence' (*Jean Monnet Center at NYU School of Law*, 1995) <http://www.jeanmonnetprogram.org/archive/papers/95/9513ind.html> accessed 31 July 2020.

> *of law*, connected with the political, economic, social or cultural order of the Member State concerned'. On that basis, the Advocate General considered that *'[p]urely economic* interests, such as the threat of pecuniary damage — however high', cannot be characterised as public-policy interests.
>
> In my view, the emphasis should be placed not essentially on the legal nature of the interests protected by public policy, but rather on whether the rules and values involved are among those *the breach of which cannot be tolerated* by the legal order of the place in which recognition and enforcement are sought because such a breach would be unacceptable from the viewpoint of a free and democratic State governed by the rule of law. It is therefore a question of the body of 'principles that form part of the very foundations of the [EU] legal order'. [30]

In this view, the Court may find itself in the position of assessing the public policy of a Member State in the light of those principles, and may, therefore, require guidance from that state. Granger suggests that governments assist the Court at this point by expressing their policy interests in a 'legal format' that helps the Court incorporate those interests into its decisions without threatening the Court's legitimacy.[31]

Granger points out another respect in which the Court may make use of political information from Member States: that is, when it finds itself policing 'the uncertain borders between EU and national levels of actions': matters of competence, subsidiarity, specific financial arrangements and the principle of sincere cooperation. Many such cases draw a large number of submissions from member-state governments and their observations are alluded to in the Opinions and, occasionally, the judgments (*Pringle, OMT*).[32] When these questions are adjudicated, they are presented as issues of law, but they may be received at the national level as political decisions.

As Dumon pointed out in 1976, 'a political decision should not be confused with a decision which entails political consequences.'[33] The Court's being alerted to the political implications of

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[30] Case C-536/13 *Gazprom* EU:C:2014:2414, Opinion of AG Wathelet, paras 176-177.

[31] Marie-Pierre Granger, 'When Governments Go to Luxembourg... the Influence of Governments on the Court of Justice' (2004) 29 EL Rev 1, 19.

[32] Case C-370/12 *Pringle* EU:C:2012:756; Case C-62/14 *Gauweiler* EU:C:2015:400.

[33] Marie-Pierre Granger, 'Governments in Luxembourg: How Do Governments Use EU Litigation to Protect National Policies or Influence EU Policy and Law-Making (Paper Presented at ECPR Fifth Pan-European Conference on EU Politics, Porto, 24-26 June 2010)' (2010) <https://www.semanticscholar.org/paper/Paper-

a case does not imply that those implications cause it to change its decision. Instead, the most likely outcome is that the judgment will use what Hamson describes as 'the ritual formula', pointing out that it is for the national court to decide on the facts, taking into account any allowable policy considerations.[34] The Court made this clear in *Palacios de la Villa*, in which it said (in the context of employment policy versus non-discrimination on the grounds of age) 'it is for the competent authorities of the Member States to find the right balance between the different interests involved'.[35] In practice, references by the Court to political context are more likely to appear in an Advocate General's Opinion than in the judgment. Such references are rarely explicit, though there are exceptions: in *Wencel*, for instance, the Advocate General cites the German government's comments on the political history of the legislation in question.[36] In *Festersen*, the Advocate General discusses the national political context in which agricultural legislation was initially passed.[37] It is helpful for the Court to know the political context of a case, even if it does not contribute to its legal reasoning as such.

Pratt observes that the Court benefits from seeing the difference between the view of the institutions and that of the Member States on an issue: 'The Commission puts in observations giving the Community view and it is clearly desirable that, in difficult and controversial cases, these should be balanced by observations from the Member States.'[38] In this context, it is interesting that Moravcsik, arguing for a mainly intergovernmental analysis of the EU, argues that lack of knowledge of Member States' preferences has weakened the Commission vis-à-vis the Member States, which 'were in fact better informed about each other's preferences and about the intricacies of agricultural policy than was the Commission'.[39]

Finally, a Member State may spot a politico-legal issue lurking behind the facts of a case—especially given the Court's history of uncovering important legal principles in quotidian cases—or force into the open an issue that the Court did not intend to discuss.

1596%3A-Governments-in-Luxembourg%3A-How-Do-Use-Granger/d95b6c5e9d3014db20e65728bc7fc66a5063c42a> accessed 31 July 2020.

[34] CJ Hamson, 'Methods of Interpretation - A Critical Assessment of the Results', *Report of the Judicial and Academic Conference 27-28 September 1976* (Court of Justice of the European Communities 1976) II–8.

[35] Case C-411/05 *Palacios de la Villa* EU:C:2007:604, para 71.

[36] Case C-589/10 *Wencel* EU:C:2012:304, Opinion of AG Cruz Villalón.

[37] Case C-370/05 *Festersen* EU:C:2006:635, Opinion of AG Stix-Hackl, paras 36-37, 47.

[38] Hamson (n 34) II–8.

[39] Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press 1998) 230-2.

All of the above reasons for the Court to find Member States' submissions helpful apply whether or not the Court promotes what Pescatore famously describes as 'a certain idea of Europe' or engages in deliberate activism.[40] Some of the Court's decisions, while ostensibly intended to ensure the effectiveness of the Treaty, have had such marked political consequences that many authors have argued that they are evidence of an integrationist agenda on the part of the members of the Court.[41] Some argue that the Court seeks to further such an agenda at every opportunity. If the Court is indeed making decisions based on its own political preferences, it would be logical for the Court to find out how far the Member States would allow it to go before seeking to block legal developments via legislation.

Larsson and Naurin base their conception of the Court's behaviour on empirical evidence of a link between the content of member-state governments' observations and whether the Court's decision reflects a willingness to make politically controversial judgments. They propose that 'judges are both concerned with—and uncertain of—what the political reactions to their decisions will be… As a consequence, judges … with policy preferences are likely to be attentive to, and act on, signals that contain political information that relates to the probability of override'.[42] They argue that the Court takes the opportunity to further integration when its analysis of the Member States' positions suggests, not that a majority of Member States support its position, but that there will be a sufficient *minority* of states in favour to block any attempts to override it at the Council. In this scenario, member-state governments' submissions are not just helpful to the Court, but essential to its strategy.

Finally, it has been suggested that the Court may benefit from knowing whether domestic courts are going to be implementing its decisions in a hostile executive environment, not in order to change its judgments but to decide how to express its reasoning. In other words, the content of member-state observations may affect the way in which judgments are written.[43]

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[40] Pierre Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 8 European Law Review 155, 157.

[41] Allan Rosas, 'Separation of Powers in the European Union' (2007) 41 The International Lawyer 1033, 1037; Andreas Grimmel, 'Judicial Interpretation or Judicial Activism? The Legacy of Rationalism in the Studies of the European Court of Justice' (2012) 18 European Law Journal 518; Olof Larsson and Daniel Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU' (2016) 70 International Organization 377.

[42] Larsson and Naurin (n 41) 403.

[43] Lupu and Voeten (n 11) 414 (referring to the ECtHR); Olof Larsson and others, 'Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union' (2016) Comparative Political Studies online edn April 2016, 163.

3. Issues of national identity

A related situation in which the Court may be assisted by information from the Member States is when issues of national identity or national values are raised. This occurred in *Torresi*, in which Italy argued that the requirement under Article 3 of Directive 98/5 to recognise other states' professional qualifications conflicted with the requirement to respect 'national identities, inherent in their fundamental structures, political and constitutional' under Article 4(2) TEU. AG Wahl notes in his Opinion that he agrees with the observations of the Spanish and Polish governments.[44] In this instance, Italy's appeal to the constitutional nature of its restriction was rejected. However, Wahl notes that the Court is willing to weigh to such concerns in some circumstances, citing *Omega* and *Sayn-Wittgenstein*, in which national values were weighed against the free movement of goods and freedom of movement respectively.[45] In *Omega*, the German government's argument that games which involved simulated killing were incompatible with the system of values enshrined in German law was accepted by the Court.[46] *Sayn-Wittgenstein*—on the Austrian government's refusal to recognise titles of nobility—is a rare case where the six intervening Member States' observations are laid out in the judgment. However, its chief relevance to this discussion is that it explicitly equates a state's reference to national constitutional values with reliance on public policy.[47] It can be argued that the two are not identical. As these examples suggest, national identity issues can be idiosyncratic and are less likely to be invoked as EU-wide principles than, say, public morality.

Cloots argues that there is a distinction between national identity and constitutional identity.[48] Both are cited—without a clear distinction necessarily being drawn—in the cases mentioned above, but the information provided by the Member States under each of these guises is used in the same way by the Court.

4. Sounding out Member States' reactions to possible legal changes

The Court may invite interested parties to submit observations if it anticipates an important change to EU law. The advisability of this, both in terms of the clarity and coherence of the

[44] Joined cases C-58/13 and C-59/13 *Torresi* EU:C:2014:265, Opinion of AG Wahl, para 104.

[45] Case C-36/02 *Omega* EU:C:2004:614; Case C-208/09 *Sayn-Wittgenstein* EU:C:2010:806.

[46] '[I]ncompatible avec le système de valeurs de la loi fondamentale allemande': Report for the Hearing held at University of Gothenburg, para 53.

[47] *Sayn-Wittgenstein* EU:C:2010:806, para 84; see also Case C-353/06 *Grunkin and Paul* EU:C:2008:559.

[48] Elke Cloots, 'National Identity, Constitutional Identity, and Sovereignty in the EU' (2016) 45 Netherlands Journal of Legal Philosophy 82.

law and its acceptance by the Member States, can be illustrated by looking at two cases in which the Court explored the scope of the direct effect of Directives, *Pfeiffer* and *Mangold*.[49] The *Trailers* case shows the same process in a direct action.[50]

In *Pfeiffer*, a case on the Working Time Directive, the Court received no written observations from the Member States and initially decided that the questions referred could be dealt with without an oral hearing. During their deliberations, it became clear that one of the questions referred raised the question of whether Article 6 of the Directive could be invoked in proceedings between individuals: that is, in a horizontal situation. The Court decided to reopen the oral procedure and give a second opportunity for the parties, the Member States, the Council and the Commission to make observations. In the event, four Member States did so, 'quite openly show[ing] their dismay at the possibility of a change of direction in the case-law.'[51] The Court reaffirmed that there could be no horizontal direct effect for Directives that govern only private law.[52] *Pfeiffer* has been cited as an example of a case where member-state government submissions may have prevented the Court from 'taking the wrong route'.[53]

The UK is alleged to have been aggrieved that the same procedure was not followed in the German case *Mangold*, in which the Court departed from the principles that it had been developing in the line of cases that included *Pfeiffer*.[54] In effect, the Court argued that the general principle of non-discrimination found in the Treaties was sufficient to establish the horizontal direct effect of a Directive, in this case the Equal Treatment Directive which, at the time, had not been implemented in Germany.[55] As Dashwood says, this reasoning was 'so much out of the blue that no Member State other than Germany had seen the need to make

[49] Joined cases C-397/01 to C-403/01 *Pfeiffer* EU:C:2004:584; Case C-144/04 *Mangold* EU:C:2005:709.

[50] Case C-110/05 *Commission v Italy (Trailers)* EU:C:2009:66.

[51] Joined cases C-397/01 to C-403/01 *Pfeiffer* EU:C: 2004:227, second Opinion of AG Ruiz-Jarabo Colomer, para 22.

[52] Joined cases C-397/01 to C-403/01 *Pfeiffer* EU:C:2004:584, paras 1-5; Alan Dashwood, 'From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?' [2007] Cambridge Yearbook of European Legal Studies 102; Olof Larsson and others, 'Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union' (2016) 50 Comparative Political Studies 879.

[53] Conversation with UK legal agent, January 2014.

[54] Case C-144/04 *Mangold* EU:C:2005:709.

[55] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

written or oral submissions.'[56] *Mangold* has been widely criticised; it can be argued that the Court might have benefited in two ways from following the same procedure as in *Pfeiffer*: it would have had the observations of several Member States, and its decision would have gained legitimacy from the open consideration of Member States' legal arguments.[57]

The Court's respect for member-state observations is underlined by the fact that it may be willing to accept submissions from states that are not currently affected by the legal measures concerned but may become so in the future. In *Tessili*, the UK and Ireland were allowed to submit observations—with the agreement of all parties except France—apparently on the principle that, although not then a party to the Brussels I Convention, they were expected to become parties in the future.[58] There is no case law on whether the Court would allow submissions from a state that could never be concerned by the subject matter of a case, and would not, for instance, have voted on it in Council. Broberg and Fenger argue that such observations should be allowed in a case that raises 'issues of general legal and political importance'.[59]

5. The identification of the legal principles governing a case, including any broader legal implications

Submissions from the Member States may shine a light on the legal principles governing a case at two scales. At the smaller scale, Member States may contribute by clarifying a confused order for reference, by picking out the 'right' questions and focusing the case on the most relevant issues, by making a case against (or for) justiciability and by helping the Court to categorise the case. They may also uncover recondite issues that had eluded the national court. At the larger scale, Member States may alert the Court to broader issues that may not be apparent from an order for reference that is only concerned with the facts of a particular national case. One anonymous interviewee described this as 'doing the Court's homework' and argued that the Court should not be encouraged to rely on it.

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[56] Dashwood (n 52) 102.

[57] Legal and political criticisms of the *Mangold* judgment are listed in Tamara Ćapeta, 'The Advocate General: Bringing Clarity to CJEU Decisions? A Case-Study of Mangold and Kücükdeveci' [2012] CYELS Vol 14 2011–2012 563 fns 13 and 14.

[58] Case 12/76 *Tessili* EU:C:1976:133; Hjalte Rasmussen, 'A New Generation of Community Law? Reflections on the Handling by the Court of Justice of the Protocol of 1971 Relating to the Interpretation of the Brussels Convention on Jurisdiction and Enforcement of Judgments' (1978) 15 CML Rev 249.

[59] Broberg and Fenger (n 8) 343.

Both a government agent and a retired Advocate General who were interviewed during this research argued that member-state observations might assist the Court by making an unclear order for reference intelligible.[60] The same is implied in AG Jacobs' Opinion in *Vaneetveld*.[61] The degree to which this is feasible is, however, limited. At one time, the Court appeared to be willing to extract answerable questions from unsatisfactory references, and a non-party submission might have drawn the Court's attention to such questions. The possibility was, however, circumscribed by the rule that no questions of EU law may be addressed in the observations that were not raised by the national court itself.[62] This willingness was, in any event, retracted in 1993, when the Advocate General in *Telemarsicabruzzo* suggested that:

> [I]t is unsatisfactory both on principle and in practical terms for the Court to have to extract from the parties' observations in the main proceedings the information which it requires on the factual and legal background to the questions in a reference. Such work may not merely be very demanding in terms of resources but may also carry a risk of errors.[63]

It must be even more the case of other non-parties' observations. Attempts to amend the questions or change the scope of the reference have therefore been resisted: see, for instance, *Design Concept,* in which the Court explicitly rejects such an attempt by, among others, the French government.[64] Writing in 1997, Barnard and Sharpston argue that the Court should not be required to 'wait and see whether the combination of the national court file deposited at its registry and the written observations which it receives enable it to piece together the jigsaw' but should insist on the order for reference containing sufficient information to start

[60] Interviews with Sir Francis Jacobs February 2014 and with Professor Sir Alan Dashwood March 2014; see also Takis Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 Common Market Law Review 9.

[61] Case C-316/93 *Vaneetveld* EU:C:1994:32, Opinion of AG Jacobs, paras 5-10.

[62] See e.g. Joined cases 141 to 143/81 *Holdijk* EU:C:1982:122, paras 4-8.

[63] Tridimas (n 60) 9; Joined cases C-320 to 322/90 *Telemarsicabruzzo* EU:C:1992:373, Opinion of AG Gulmann, para 20.

[64] Case C-438/01 *Design Concept* EU:C:2003:325, paras 13-15; Denis Batta, 'The Relation Between National Courts and the European Court of Justice in the European Union Judicial System' (Report for European Parliament PE 378.291) (2007) 12.

with.[65] There is considerable case law to the effect that only the national court can determine the questions to be answered.

Nevertheless, the Court has relied upon observations in order to understand the factual and legal background in at least one case since *Telemarsicabruzzo*. In *Wilson,* the Court—after noting that the defendant was arguing that there was insufficient information in the reference for the Court to answer the questions—said, 'the Court considers that the information contained in the order for reference *and the observations submitted to it* is sufficient to enable it to reply usefully to the questions referred.'[66] Conversely, in *Wijsenbeek* a challenge to the admissibility of the case was rejected partly because a factual statement was not contested in any of the observations.[67]

The opposite position, in which a Member State argues in its observations that a reference is not admissible, is quite common. In *Heinrich,* for instance, three Member States did so, but the Court decided that the order for reference contained sufficient information for it to respond to the questions.[68] It might be argued that there is a logical problem here: part of the rationale for finding a case inadmissible on the grounds of an inadequate order for reference is that those entitled to submit observations will not have sufficient information to do so.[69] The Court does not seem to have treated this point with consistency, and the possibility seems to remain that a Member State's interpretation of an order for reference might uphold a case's admissibility.

A clear distinction must be made here between matters of admissibility and of justiciability. Observations relating to admissibility usually involve member-state governments arguing that a case is deficient on procedural grounds. Arguments relating to justiciability, on the other hand, are often expressed in terms of competence and subsidiarity (in the general sense: the *judicial* subsidiarity boundary—i.e. between deciding a case at the EU and national court levels—is one that the Court repeatedly acknowledges and that does not appear to trouble Member States). In *Omega,* for instance, AG Stix-Hackl discussed the justiciability of human

[65] Catherine Barnard and Eleanor Sharpston, 'The Changing Face of Article 177 References' (1997) 34 Common Market Law Review 1113, 1151.

[66] Case C-506/04 *Wilson* EU:C:2006:587, para 41 (emphasis added).

[67] Case C-378/97 *Wijsenbeek* EU:C:1999:439, para 21.

[68] Case C-345/06 *Heinrich* EU:C:2009:140, paras 25-35.

[69] Case C-176/96 *Lehtonen* EU:C:2000:201, paras 21-23.

dignity versus that of measures taken to ensure it. By contrast, the German government framed its observations in terms of whether its national rules fell within the margin of appreciation.[70] But although governments might be pictured as seeking to prevent some issues coming within the Court's influence at all, the increasing jurisprudence on national identity, discussed above, demonstrates that the Member States may also seek to include new issues within the scope of justiciability.

Member States may draw attention to matters that are not raised explicitly in an order for reference but which may be inferred or may arise by implication and which the Court needs to address.[71] Granger found that the government legal agents of several Member States saw themselves as 'true *amici curiae'*, a role that included expounding the legal issues raised in the reference.[72] Van Stralen was told by a Swedish civil servant that 'we see it as our duty to help the Court get as clear a picture as possible, even if we don't have any particular interest in the outcome or it's not politically interesting.'[73] From the Court's side, Arabadjiev says, 'sometimes Member States act as unbiased counsel to the Court, assisting us in clarifying questions of common interest.'[74] He cites the UK's contribution in *Melloni*:

> Although the narrow national interest would have favoured an interpretation of the Charter that would give priority to national constitutions over EU law, even where the matter has been the subject of harmonization, the position defended by the United Kingdom did not seem to be influenced by any such interests. Rather, it added valuable arguments in favour of a more balanced position that respects the primacy of EU law. It thus acted as a special 'neutral' counsel to the Court.[75]

Arabadjiev's 'questions of common interest' include the elucidation of competing legal principles and EU rules. As Arabadjiev points out, the government of the Member State from which a reference comes 'is in the best position to provide the relevant legal arguments in

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[70] Report for the Hearing held at University of Gothenburg, paras 53-61.

[71] See e.g. Case C-239/02 *Douwe Egberts* EU:C:2003:668, Opinion of AG Geelhoed, para 24; Joined cases C-402/07 and C-432/07 *Sturgeon* EU:C:2009:416, Opinion of AG Sharpston, para 38.

[72] Hjalte Rasmussen, 'Docket Control Mechanisms, the EC Court and the Preliminary References Procedure' in Mads Andenas (ed), *Article 177 References to the European Court: Policy and Practice* (Butterworths 1994) 91.

[73] Floris van Stralen, 'The Member States and the Court of Justice: Why Do Member States Participate in Preliminary Reference Proceedings?' (MA thesis, University of Gothenburg 2015).

[74] Arabadjiev (n 17) 4.

[75] Arabadjiev (n 17) 8; Case C-399/11 *Melloni* EU:C:2013:107.

terms, for example, of justification, necessity and proportionality.'[76] While the Court stresses that balancing these is ultimately for the national court, it nevertheless discusses such issues extensively; indeed, Bengoetxea, MacCormick and Moral Soriano regard the Court's decisions as representing 'policy expressed in principles, and particularly in a choice between rival principles.' [77] Such Reports for the Hearing as are available make it clear that the Member States frequently raise these competing issues in their observations, most commonly balancing legal principles on the one side against their national public interest on the other. Few cases do not involve some kind of balancing exercise. In *Betfair*, for instance, the ten member-state observations include references to the principles of equal treatment, transparency, proportionality, national public interest and a general EU interest in controlling the harm caused by gambling, as well as to competition and the freedom to provide services.[78] In *Briels*, for which both the UK's written and oral observations are available, scientific considerations form part of the legal arguments.[79]

In the rare circumstances that a Member State's full observations are available—usually in response to a Freedom of Information request—it can be seen that, in addition to discussion of the legal issues raised by the case, they frequently include a survey of the case law.[80] This is difficult to discern from Reports for the Hearing and such accounts of member-state legal arguments as are given in Opinions and judgments. However, in *Emmott*, Advocate General Mischo refers explicitly to Member States' citation of case law, saying 'Like the respondent Irish authorities, the Governments of the United Kingdom and the Netherlands and the Commission, I consider it possible to apply here the Court's established case-law.'[81]

AG Mischo's words raise an interesting point, which is that—although it is possible to assume that, even if the Advocate General's conclusions are not followed, his or her sources

[76] Arabadjiev (n 17) 4.

[77] Joxerramon Bengoetxea, Neil MacCormick and Leonor Moral Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in Gráinne de Búrca and Joseph HH Weiler (eds), *The European Court of Justice* (OUP 2001) 83.

[78] Case C-203/08 *Sporting Exchange* EU:C:2010:307, (information on observations from University of Gothenburg collection of Reports for the Hearing).

[79] Case C-521/12 *Briels* EU:C:2014:330; FOI release UK submissions to the 'Briels' case <https://www.gov.uk/government/publications/uk-submissions-to-the-briels-case> accessed 31 July 2020.

[80] See *Briels* (n 79) and particularly the UK's arguments in Case C-394/07 *Gambazzi* EU:C:2009:219, <http://conflictoflaws.net/2009/the-written-observations-submitted-in-the-gambazzi-case/> accessed 31 July 2020.

[81] Case C-208/90 *Emmott* EU:C:1991:164, para 16.

and reasoning contribute to the Court's deliberation—the Member States' legal arguments must inevitably act primarily on or through the Advocate General. AG Sharpston acknowledges the fact that member-state observations are considered in detail by Advocates General (or their référendaires) in *El Kott*.[82] Advocates General have occasionally explicitly conceded the influence of a Member State's observations in changing their minds, as AG Jacobs does of the Netherlands government's arguments in *Bettray*.[83]

6. Identifying points of disagreement between the Member States in order to press for more European integration

Larsson proposes a controversial hypothesis, which is that if the Court of Justice becomes aware via member-state observations that the Member States disagree on the interpretation of a provision of EU law, the Court may seize the opportunity to opt for the reading that furthers European integration.[84] The hypothesis supposes that the Court has a pre-existing agenda to promote European integration, envisaged as a preference for disputes to be settled at the EU level ('more EU') rather than via conflicting national legislation ('less EU'). It also assumes that if Member States disagree with a 'more EU' judgment, they will seek to overrule the Court's decision by introducing new legislation at the Council. According to Larsson's theory, the agreement of a majority of Member States is not needed for the Court's view to prevail: all that is required is for there to be evidence of a blocking *minority*. In these circumstances, any legislative challenge to the Court's decision is likely to fail.

Larsson and Naurin performed an empirical study of Reports for the Hearing archived by the Swedish foreign ministry from 1997 to 2008, comparing the net position of the Member States in terms of 'more EU' and 'less EU' with the Court's decision in each case, where such positions could be identified.[85] The level of agreement between the Member States' stated views and the Court's judgment was found to be significantly higher in areas where legislation to override the Court's decision would require a qualified majority, rather than

[82] Case C-364/11 *El Kott* EU:C:2012:569, para 26.

[83] Case 344/87 *Bettray* EU:C:1989:113, para 26 (Opinion of AG Jacobs) and at interview.

[84] Olof Larsson, 'Minoritarian Activism: Judicial Politics in the European Union' (PhD thesis, University of Gothenburg 2016).

[85] Larsson and Naurin (n 41).

unanimity, at the Council.[86] Larsson and Naurin argue strongly that the Member States' influence on the Court's development of EU law is not a majoritarian one; their analysis demonstrates that, far from acting with one voice, the Member States rarely agree on their suggested answers to the questions referred to the Court. Instead, the Court's opportunity to develop the law is afforded precisely by those disagreements.

Larsson and Naurin's theory is based on the assumption that when the Member States particularly dislike a judgment of the Court of Justice, they have it within their power to reverse the Court's decision by promoting and passing new legislation. Thus the preferences of the governments do set boundaries to the Court's discretion. In Larsson and Naurin's model, however, the Court is not merely the passive recipient of the Member States' preferences but a sophisticated player in the system of law-making. An interesting feature is that this tactic can be argued to depend on the Member States being unaware that their submissions are being used in the way postulated.

7. Assisting in case management

As described in Chapter 2, the Court has several procedural choices to make before a case reaches the judges for their deliberation. The Judge-Rapporteur makes proposals on each of these choices in consultation with the Advocate General, which are presented to the Court at a general meeting. The choices are:

i. the formation of the Court required
ii. whether there should be an oral hearing
iii. the likely duration of the pleadings
iv. whether the Court should send any questions for written or oral responses
v. whether the participants in a hearing should be asked to concentrate on specific issues
vi. whether there should be an Advocate General's Opinion and
vii. whether to request a research note from the Court's research service.

Items (iv), (v) and (vii) relate to the information required for the Court to reach its conclusions. If necessary information that was not supplied by the referring national court can be obtained from Member States' submissions, additional measures may not be required. The

[86] Olof Larsson and Daniel Naurin, 'National Interests and Member State Participation in the European Court of Justice' (Swedish Network for European Studies in Political Science Spring Conference, 14-15 March 2013) (2013) Fig 3.

effect of member-state governments' submissions on (i) and (ii)—the choice of formation of the Court and whether there should be an oral hearing—is less clear. The decision must be most strongly influenced by the legal points at issue; nevertheless, a case's perceived importance can, at least, not be diminished by the arrival of written observations from Member States.

Equally, where the Advocate General is undecided as to whether an Opinion is necessary, the arrival of written observations, particularly from certain Member States, may be sufficient to tip the balance in favour of an Opinion. This definitely occurs,[87] but it is difficult to confirm a general effect because of the possibility of a third-cause fallacy: that is, that the arrival of written observations and the decision to have an Opinion are independently inspired by the importance of the issues in the case. It is nevertheless interesting to consider some numbers. Table 4 shows the percentage of cases that merited an Opinion in 2012 and 2013.[88]

Table 4 Percentage of cases with an Opinion

	Number of submissions from Member States, 2012-13										
	0	1	2	3	4	5	6	7	8	12	Total
Opinion (nos)	12	80	78	51	29	16	16	6	5	1	294
No opinion (nos)	29	101	57	44	16	9	2		1		259
Opinion (%)	29%	44%	58%	54%	64%	64%	89%	100%	83%	100%	53%
No opinion (%)	71%	56%	42%	46%	36%	36%	11%	0%	17%	0%	47%

These percentages bear out the observation that, ever since the Advocate General's Opinion became optional in cases that raised no new issue of law in 2003, the proportion of cases with an Opinion has dropped to about half. For cases with no submissions from Member States, this falls to 29%; those with only one merited an Opinion in 44% of cases. As the number of submissions from Member States rises, so does the proportion of cases receiving an Opinion.[89] The figures do not, however, distinguish between a situation in which the decision to have an Opinion is influenced by member-state submissions and that where the decision is based entirely on the Court's assessment of the legal importance of a case, with which the Member States happen to agree.

[87] My own experience when present at an Advocate General's planning meetings, 2015.

[88] The 2013 figures were incomplete at the cut-off date of this thesis; if this analysis were to be pursued further the remaining cases would have to be included to ensure that no bias resulted from the exclusion of cases that took longer to decide.

[89] There is one anomaly: Case C-632/13 *Hirvonen* EU:C:2015:765, a case on income tax that had greater revenue than EU law implications and received submissions from eight Member States.

A more useful question is whether the identity of the Member State has any effect on the likelihood of an Opinion. To answer this question, it must be assumed that as a general rule, the submissions that Member States make in their national cases are a matter of routine and are less likely to influence the Court than their observations in other states' cases. The majority (82%) of cases which garnered only one submission in the period 2012-13 fall into the former category.

There were 331 cases with more than one member-state submission, of which 61% had an Opinion. Considering only submissions in other Member States' cases, states are listed in Table 5 in order of the ratio of their submissions in cases with an Opinion to their submissions in those without. For example, Greece made 66 submissions in cases other than its own, and 2.3 times as many of those cases had an Opinion than did not. For some Member States, the number of submissions made in the period was so small that their results could not be held to be representative of their long-term behaviour.[90]

Table 5

Cases with 2+ submissions, 2012-13 (331 cases)					
	Submissions	With Opinion : without Opinion		Submissions	With Opinion : without Opinion
Lithuania	7	6	Ireland	14	1.8
UK	**59**	**3.21**	**France**	**52**	**1.74**
Latvia	4	3	**Poland**	**78**	**1.52**
Netherlands	**45**	**2.75**	**Czech R**	**58**	**1.32**
Germany	**79**	**2.43**	**Spain**	**43**	**1.26**
Austria	**41**	**2.42**	Slovenia	2	1
Italy	**54**	**2.38**	Hungary	23	0.92
Estonia	20	2.33	Bulgaria*	0	
Greece	**66**	**2.3**	Romania*	4	
Finland	13	2.25	Slovakia*	2	
Sweden	16	2.2	Cyprus*	2	
Denmark	18	2	Luxembourg*	1	
Portugal	**40**	**1.86**	Malta*	1	
Belgium	**31**	**1.82**	Total/ave	773	1.72

*These countries either made no submissions in cases without Opinions, or in the case of Malta, none in cases with an Opinion.

[90] A rule of thumb is that a sample-size of at least 30 is required for an inference to be drawn with any statistical significance.

For those states that made significant numbers of submissions (bolded in Table 5) a comparison between pairs of countries that made similar numbers of submissions shows that it is possible to say that (for instance) submissions from the UK are more likely to occur in cases with an Opinion than is the case for the Czech Republic, submissions from Germany more likely to occur in cases with an Opinion than those from Poland, and those from the Netherlands than from Spain. But, as noted above, it is not possible—without more detailed investigation—to say whether this is because the governments of the UK, Germany and the Netherlands have more influence over the Court than those of the Czech Republic, Poland and Spain, or because the former governments are better at identifying (or more interested in) cases that raised novel issues of EU law. The meticulous technique used by the Netherlands for identifying situations in which it should submit observations was mentioned in Chapter 3 and suggests an avenue for further research. At present, the best that can be said is that the arrival of member-state submissions occasionally influences the Court's choice of whether to have an Advocate General's Opinion, and there is sufficient evidence to justify further research into whether member-state submissions have a systematic effect on that choice.

A further opportunity for a Member State to influence the Court's procedure arises in principle when a state requests that a hearing be reopened after the oral procedure has concluded—usually, in the hopes of arguing with an Advocate General's Opinion. As noted in Chapter 2, to date, the Court has only reopened hearings of its own initiative. This has usually occurred when the Court has decided that it requires further information to reach its judgment,[91] but it may also do this in the light of a reassessment of the importance of the legal issues involved.[92] It has refused all such applications from Member States.[93] Refusal does not mean, however, that such an application is purposeless. The Court is made aware of the arguments the Member State uses to support its application, and while it cannot formally assess them in the same way as it does legitimate observations, it is only human nature for the judges to have them in mind while considering their decision, and in similar cases in the future.[94]

[91] See e.g. Orders of the Court in Case C-134/13 *Raytek and Fluke* EU:C:2014:2355 and Case C-689/13 *PFE* EU:C:2015:521.

[92] Order of the Court in Case C-524/15 *Menci* EU:C:2017:64.

[93] See, notably, Order of the Court in Case C-17/98 *Emesa Sugar* EU:C:2000:69; also e.g. Order of the Court in Case C-446/04 *Test Claimants in the FII Group Litigation* EU:C:2006:761.

[94] Interview with référendaire, 23 April 2015.

There is also a possibly singular instance in which a Member State's observations affected not just the procedural choices for a particular case, but the Court's procedural rules. Arabadjiev states that the UK government's observations in *ZZ* were taken into account when the Court drafted amendments to its own Rules of Procedure.[95] The UK's arguments in *ZZ*, on the extent to which a court was entitled to withhold its reasoning from the defendant in cases that touched on national security, acted, he says, as a 'sort of inspiration for the Court' and the UK's observations had 'thus been invaluable in revealing new aspects and possible solutions to this very delicate issue.'[96]

The effect of Member States' observations on the procedural treatment of preliminary references impacts almost entirely on matters of pure law. A case that receives an Advocate General's Opinion because of member-state governments' observations is more likely to take a place in the academic canon, but any influence on the Court's judgment is difficult to attribute to anything other than the legal merits of the case.

8. Improving the Court's legitimacy and status in the Member States

The previous headings have considered the influence of Member States' observations on the Court's decision-making in particular cases. A final way in which they might be of use to the Court, however, is by boosting the status of the Court's decisions and reinforcing the legitimacy of the Court itself.

A great deal has been written about the sources of the legitimacy of courts in general, and of the Court of Justice in particular.[97] A detailed consideration of the literature is outside the scope of this thesis, but some points will briefly be considered below that are specific to the argument of this chapter—in particular, that allowing the Member States to intervene in the Court's proceedings reinforces the legitimacy of both EU case law and the Court *as an institution* in the eyes of national executives.

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[95] Case C-300/11 *ZZ* EU:C:2013:363.

[96] Arabadjiev (n 17) 5.

[97] Among others, Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff 1986); Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403; Gregory A Caldeira and James L Gibson, 'The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support' (1995) 89 APS Rev 356; Mitchel de S O-l'E Lasser, *On Judicial Transparency, Control, and Accountability: A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP 2009).

As Weiler notes, legitimacy is 'one of the most underspecified concepts in political theory and social science.'[98] What is under discussion here might be described as a sociological, rather than a normative, view of legitimacy—that is, legitimacy derived from the credibility of a court and its decisions, both to other courts and to the other branches of the state. What is important is to identify some factors that give authority to the Court of Justice and its decisions and which are—at least in principle—susceptible to influence by the governments of the Member States.

In the first place, the Court's procedural legitimacy derives from the fact that it was established by a treaty to which the Member States acceded.[99] However, the consensus is that its ongoing legitimacy is maintained by the fact that its decisions are recognised and applied by the courts of the Member States; that is, they accept the legitimacy, both procedural and substantive, of its case law. This relationship is self-sustaining: the more national courts comply with the Court of Justice's decisions, the greater the 'reservoir of favourable opinion' accruing to the Court's jurisprudence and the greater its acceptability.[100] In applying case law that is based on the interpretation of the EU's primary and secondary legislation, Member States' courts are also treating EU statutes as binding in the same way that they do national statute law.

At the national level, the fact that courts apply domestic statutes (and where relevant, common law) in a procedurally correct manner gives them legitimacy in the eyes of the other branches of the state.[101] This does not stem entirely from the fact that legislatures have been responsible for those domestic statutes—as have to a greater or lesser degree the executives—but also from respect for the constitutional relationships between the branches of the state. This customary respect can be argued to encompass the Court of Justice, if at a remove; the routine recognition by a Member State's courts of the *acquis communautaire* lends it, and by extension the Court of Justice, legitimacy from the perspective of the

[98] Joseph HH Weiler, 'Epilogue: Judging the Judges - Apology and Critique' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013) 235.

[99] This aspect of its legitimacy probably meets the criteria for both sociological *and* normative legitimacy.

[100] Caldeira and Gibson (n 97) 357.

[101] Adam Tucker, 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty' (2011) 31 Oxford Journal of Legal Studies 61.

executive and legislature.[102] Some evidence of this respect was noted by Rasmussen, who was unable to find any instance of a Member State challenging, in its observations, the Court's reasoning in a previous case.[103]

The situation is different as regards the element of legitimacy that stems from the application of legislation for which a government is responsible. A given Member State may have had much less input into legislation, even if (as is usually the case) it voted for the measure in the Council. Of course, even national legislation is the outcome of bargaining, but the intergovernmental nature of the EU's legislative procedure means that governments are likely to feel less ownership of legislation and potentially less respect for any resulting case law. This is where the continuous discourse model of member-state observations is a better description of what takes place: the opportunity for the Member States both to have a second attempt to mould primary and secondary law to their satisfaction, and to be involved in the Court's procedure, can be argued to restore some legitimacy to the Court in the eyes of national governments. There is a corollary: if it is accepted that the opportunity for the Member States to take part in the Court's proceedings supports the legitimacy of the Court and its case law, it seems likely that the prestige of the Court will be higher in a Member State where the government regularly engages with the Court's proceedings. This hypothesis would be challenging to test empirically owing to the difficulty of distinguishing cause and effect: does a Member State participate in the Court's proceedings more frequently because that state respects the Court, or does frequent participation strengthen respect? Both are likely to be true. Nevertheless, the existence of the procedure may reinforce the Court's legitimacy even if the Member States do not avail themselves of it.

There is a further aspect to this. The legitimacy of a court's case law depends on its procedural correctness in terms of coherence, the court's methods of interpretation and its reasoning; this is what Lenaerts terms 'internal legitimacy'.[104] Unlike in domestic jurisprudence, these are all areas in which member-state governments may seek to influence the Court. Thus Member States' input may improve judgments, making the decisions more

[102] If possibly not the Fourth Estate.

[103] Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Nijhoff 1986) 275–81.

[104] Koen Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013) 14.

usable by national courts in the future and adding to legitimacy. Lasser argues that the concise style of the Court of Justice's judgments tends to provide an account of the Court's reasoning that is insufficient to 'generate an appropriate degree of … judicial legitimacy', but that the more discursive style of Opinions tempers the problem.[105] To the extent that a Member State's legal arguments are laid out and dealt with by the Advocate General, they will contribute to legitimacy by that route also.

Returning to external legitimacy, the influence that member-state governments might have over the Court's legitimacy was described above in terms of the continuous discourse model. It may, however, also be described in terms of the Court's need to find the limits of its 'zone of discretion'. Garrett, Kelemen and Schulz express this thus:

> The Court's legitimacy ultimately relies on the support of member governments and hence on its serving as an impartial interpreter of EU law. In order to maintain its legitimacy, the Court will seek to avoid making decisions that it anticipates governments will defy. In order to maintain its status as an independent arbiter, however, the Court must strive to maintain legal consistency and to minimize the appearance of succumbing to political pressures from interested parties.[106]

It can be argued that that Member States' interventions enable the Court to establish the boundaries of its 'zone of discretion', beyond which political pressures will come into play. This model of member-state intervention will be described in Chapter 7 but in the meantime might, barely, support an argument that Member States' interventions aid the Court by reinforcing its legitimacy.

The opposite argument might be made regarding the legitimacy of the Court of Justice in the eyes of the public. As Rossi and Vinagre e Silva point out of interventions in cases on access to documents, when a Member State 'charges into pending proceedings' to support institutions against applicants, or more generally governments against individuals, this 'will hardly engender sympathy on the part of the public' (towards the Member State) nor indeed towards the Court of Justice.[107]

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[105] Lasser (n 97) 4.

[106] Geoffrey Garrett, R Daniel Kelemen and Heiner Schulz, 'The European Court of Justice, National Governments, and Legal Integration in the European Union' (1998) 52 International Organization 149, 151.

[107] Leonor Rossi and Patricia Vinagre e Silva, *Public Access to Documents in the EU* (Hart 2017).

The preceding arguments have, of necessity, been made in very general terms, but the usefulness of this hypothesis should not be underestimated. It is relevant to all the models that have been postulated to explain Member States' interactions with the Court of Justice and, unlike the points deliberated in the other sections of this chapter, is not confined to individual cases but is a universal effect.

Reciprocal benefits

The reasons that the Court might benefit from Member States' submissions given above include a number that benefit both Court and governments, but even those that are identified as being primarily of use to the Court—the contribution that observations may make to case management, for instance—benefit governments by promoting an expeditious and mutually agreed-upon dispute resolution system. It can be argued that the majority of the points highlighted are of mutual benefit: the provision of factual information; the clarification of political implications including issues of national identity, the provision of feedback from the Member States on possible legal changes and the more precise identification of the legal principles governing a case.

As noted above, the primary role envisaged for observations is described in the Court Registry's *Notes for the Guidance of Counsel*: 'It is important to bring to the attention of the Court the factual circumstances of the case before the national court and the relevant provisions of the national legislation at issue.'[108] Although the phrase implies that this would be of assistance to the Court, it is clear that such submissions of fact may also be of benefit to the Member State making them, and not merely by assisting the Court to reach a rapid and legally correct decision. Governments wish, among other things, to maximise their revenue from taxation, to avoid having to rethink policy and redraft legislation, and to preclude state liability; thus they may hope to spin even this most neutral-seeming provision.

This reciprocal aspect to Member States' observations is ignored in much academic argument about their significance, although it is implied, if rarely made explicit, by the Court itself. The notion that national *courts* and the Court of Justice acted in cooperation 'to make direct and complementary contributions to the working out of a decision' was articulated in *Schwarze* in 1965.[109] By contrast, the contribution of governments is merely implied in statements to the effect

[108] Registry of the Court of Justice of the European Communities, *Notes for the Guidance of Counsel* (Court of Justice of the European Communities 2009) s 9.

[109] Case 16/65 *Schwarze* EU:C:1965:117, 886.

that the Court's interpretation is confined to the facts and national provisions as disclosed by 'the documents before the Court', which of course include the observations of the Member States.[110]

The suggestion that Member States cooperate with the Court to their mutual benefit is not intended to imply that this cooperation does not have a contentious aspect, of course: Member States are rarely disinterested parties. Alter's characterisation of the development of the European legal system as a 'negotiated compromise' between the Court of Justice and the national courts could perhaps be extended to include member-state governments as an integral part of the negotiation process.[111]

Conclusion

The stated purpose of Member States' observations is to assist the Court in terms of factual information and, impliedly, legal argument. They may contribute to the chain of argumentation that enables the Court to reach its conclusions. As such, they have increasingly been discussed by the Court and cited—admittedly chiefly in the Opinions—as if they were conventional academic arguments.[112] These primary purposes are easy to overlook when the emphasis is on the argument that observations may be used to threaten non-compliance or eventual override if the Court reaches unwelcome conclusions. The discussion in this chapter acknowledges that there is indeed scope for such threats. If Larsson is correct, the Court may perceive Member States' submissions not just in terms of constraints, but in terms of opportunities. But even if this possibility is discounted, member-states' submissions can be argued to be an essential tool in enabling the Court to assess how strongly the Member States feel about the issues raised.

The main conclusion to be reached from this discussion is that there is a range of ways in which Member States' submissions can be of use to the Court in addition to the provision of factual information, at one end of the spectrum, and the laying down of Member States' red lines, at the other. In between those extremes, Member States may be of help to the Court in identifying the 'correct' questions from a reference, drawing attention to less obvious or long-term legal implications and analysing relevant case law. Their submissions may assist in

[110] Case 311/85 *VVR* EU:C:1987:418, para 11.

[111] Karen J Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (OUP 2001) 38.

[112] See e.g. Case C-214/10 *KHS* EU:C:2011:465, Opinion of AG Trstenjak.

deciding if an Opinion is needed and what formation of the Court is required. In addition, the fact that the procedure exists, and is used in the way that it is, can only support the Court's legitimacy in the eyes of Member States.

Chapter 5: Why do Member States submit observations to the Court?

Introduction

This chapter and the next will consider Member States' reasons for making submissions in preliminary reference cases. These reasons will be divided into those which unequivocally support the thesis that states' submissions are intended purely to further their own interests, and those that are wider (or more ambiguous) in their intentions.

As noted in Chapter 3 and discussed by Granger and van Stralen, a complete explanation must have two facets: governments' reasons for putting in place the procedures and resources for intervening as a general policy, and government bodies' reasons for submitting observations in a particular case.[1] The first aspect was discussed in Chapter 3 in terms of how a government's willingness to set aside resources for such interventions may be limited by, among other things, the Member State's size and economic circumstances: in other words, how they balance policy and capacity. The second aspect is, of course, equally affected if there is a shortage of resources. Some Member States have a proactive participation policy, assessing each preliminary reference for its relevance to their strategic view of EU legal development. Others may be forced by limitations in capacity into a more reactive participation policy, usually submitting observations only in cases originating in their national courts. Lack of resources may even affect a government's ability to respond tactically at the level of cases originating in a national court.

This chapter considers how participation in cases at the Court might benefit Member States in general, whether or not they are in practice willing—and able—to take advantage of the opportunity to do so. It argues that the resulting taxonomy of reasons, alongside that developed in the previous chapter for the viewpoint of the Court, can be employed to test theoretical models of the relationship between the Court of Justice and Member States. A general point about member-state observations is first discussed: the importance of recognising that decisions about making observations may be made at several different levels of a Member State. It then offers a possible classification of the benefits to the Member State of submitting observations.

[1] Marie-Pierre F Granger, 'When governments go to Luxembourg…the influence of governments on the Court of Justice' (2004) 29 EL Rev 1; Floris van Stralen, 'The Member States and the Court of Justice: Why Do Member States Participate in Preliminary Reference Proceedings?' (MA thesis, University of Gothenburg 2015).

Which part of government?

The fact that a state may be treated as a legal person does not justify a reductionist view that it speaks with a single voice. Several different bodies may have an influence on whether a Member State submits observations, and those bodies may differ in their motivations and even be opposed to one another. Government ministries may have different interests and different constituencies and—particularly in federal structures—be under the influence of different political parties.[2] The Dutch checklist (Appendix C) asks, 'Is there agreement with other departments (in sight)?'. It thus parenthetically acknowledges that negotiation between ministries may be taking place. As was noted in Chapter 3, the effect of a difference between government departments may vary from country to country. In the UK, for instance, the EU Litigation Unit within the Cabinet Office attempts to broker an agreement, and if that fails, it may instruct its agent based on its own understanding of the issue.[3] In Germany, in the absence of a consensus, the practice of the EU Litigation Unit within the Federal Ministry for Economic Affairs and Energy is that no submission will be made.[4]

Regrettably, it is rarely possible to determine the reason for a government's failure to submit observations in a case where, with hindsight, one might have been expected. A disagreement between ministries is a probable explanation when a government that is usually an active intervener neglects to submit observations in a case which has significant consequences, especially if other governments do intervene. One possible example is *ABNA*, in which seven of the then fifteen Member States—and both the Parliament and the Council—intervened in an argument about the proportionality of detailed labelling requirements for feedstuffs.[5] France, Italy, the Netherlands, Denmark and Greece argued that the measure was proportionate to its public health aims and the UK and Spain that it was not. Germany's absence from this debate seems inexplicable unless it can be argued that the ministries were unable to agree on a position.

[2] Argued in a talk by Bjorn Beutler and Thomas Pickartz of the Federal Ministry for Economic Affairs and Energy (Bundesministerium für Wirtschaft und Energie), University of Münster, 14 November 2014.

[3] David Edward, 'The Development of Law and Legal Process in the EU' in Basil Markesinis (ed), *The British Contribution to the Europe of the 21st Century* (Hart 2002) 31.

[4] Ariane Weidmann, 'Litigation before the Court of Justice of the European Union - from the Perspective of the Federal Republic of Germany' (talk at Centre for European Legal Studies, Cambridge, 30 October 2013).

[5] Joined cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA* EU:C:2005:741.

It is harder to attribute to internal disagreement a failure to submit a government's views in cases with few observations. The UK's neglect of *Mangold*,[6] in which the only brief was from Germany, is more likely to be attributable to inattention (or, as noted below, sheer disbelief) than to disagreement over the government's line on the issue of horizontal direct effect.[7] However, an interviewee reported that the UK legal agents were 'disgruntled' that no submission was made in *Mangold*, which points to the possibility of a lack of communication between the UK government and its independent counsel.

Disagreements may also arise within government departments. Davies describes a celebrated spat that occurred in Germany when, post-*van Gend*, several ministry functionaries issued a statement to the Court rejecting the principle of direct effect, only for their actions to be described as 'politically extremely unseemly' by their Secretary of State, who pointed out that this was contrary to Germany's official position.[8]

There may also be a difference of opinion between different levels of government. In the UK this may be manifested as a disagreement between the civil servants who work day to day in an area that is heavily dominated by EU law—and who may perceive themselves as working in cooperation with the EU institutions—and government ministers. Young and Sloman observe that 'for some departments, like the Foreign Office and the Ministry of Agriculture, [the EU] is the dominating premise of their professional lives.'[9] Civil servants—who may have been involved in an area of legislation since it was shepherded through the Council of Ministers and the European Parliament—may have a different understanding of a matter from that held by ministers, who may be new to their portfolios and who may, in any case, understand the issues from a more political viewpoint.[10] This difference of approach illustrates a more general theme that needs to be taken into account when considering governments' approach to participation at the Court of Justice: that the proceedings may bring up issues with political, as well as legal, salience, and accordingly draw different responses from different parts of government.

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[6] Case C-144/04 *Mangold* EU:C:2005:709.

[7] See below fn 43.

[8] Bill Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949-1979* (OUP 2012).

[9] Hugo Young and Anne Sloman, *No, Minister: A Inquiry into the Civil Service* (BBC 1981) 73.

[10] In the UK, attempts to bridge the gulf in understanding between the government and the permanent civil service are made by the Institute for Government <https://www.instituteforgovernment.org.uk/> accessed 3 August 2020.

Pierson and Leibfried, in arguing that competition between centres of political power has affected the development of EU social policy, also emphasise that governments are not monolithic.[11] They acknowledge the Court's role in the formulation of policy, especially where levels of government are in disagreement and there is gridlock at the national level.[12] It could be argued that, where such competition exists, the content of government observations may depend upon their specific source and may convey different nuances of policy preferences to the Court. Unfortunately for researchers, without insider knowledge, it is usually impossible to determine the *internal* source of a Member State's submission, but it should be borne in mind that different departments and levels of government may hold different views.

The executive and the legislature may similarly have different understandings and objectives. National legislatures are given little opportunity to interact with the Court in their own right, only having the option of reacting to an unwelcome decision after the fact by attempting contrary legislative measures. Their only opportunity for influence is via their executives. In the UK, for instance, parliamentary committees might have been able to pressurise a government department at either the civil service or the ministerial level. Even this level of influence may be weakened in the case of devolved or federal legislatures, which may have to go through administrations which themselves have limited opportunity to express their views. The Scottish administration, for instance, was required to draft submissions in cases that concerned its implementation of EU legislation but the Cabinet Office had to agree on the contents.[13] Thus the observations submitted by a Member State may be the outcome not just of negotiations between different departments but between executive and legislature.

Summary of taxonomy

It is more challenging to devise a taxonomy of reasons why Member States might submit observations than to offer reasons why the Court might find them useful. As such, this is simply one possible classification. Ten (non-exclusive) categories are suggested. In addition to the economic, political and structural disparities that contribute to differences in the states' participation rates, the relative importance of these factors also varies. This latter point will be

[11] Stephan Leibfried and Paul Pierson, *European Social Policy: Between Fragmentation and Integration* (Brookings Institution Press 1995) 456.

[12] Leibfried and Pierson (n 11) 36.

[13] Deputy Prime Minister's Office, *Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee* (Cmd 5240, 2001) para B4.24.

expanded upon in the next chapter, in which a direct comparison will be made between Denmark, Ireland and the UK.

1. A government has an immediate interest in the outcome of a case
2. A government has a preferred answer on a technical issue
3. A government has a preferred interpretation of a provision or principle of EU law
4. A government is acting in support of another Member State
5. A government feels the case is relevant to national constitutional interests
6. A case is relevant to a government's economic or policy preferences
7. A government feels a case offers an opportunity to clarify the law
8. A government wishes to guide the evolution of EU law
9. A government sees domestic political benefits in being seen to participate
10. A government sees the benefit of strengthening the EU's dispute resolution system and the long-term health of the EU legal order

In the context of the Member States, the list given in the previous chapter could be said to conflate *types of information* conveyed by a Member State to the Court and the Member State's *motives* in conveying that information. For example, a Member State's submission clarifying the factual circumstances of a case before its national court is of direct help to the Court in its deliberations but, for the Member State, conveying the information is usually not an end in itself but a step towards achieving its objectives. This logical distinction may not always be made explicit in this chapter, but it should be understood in the arguments that follow.

1. A government has an immediate interest in the outcome of the national case

In many instances, the government of a Member State may have an immediate interest in the outcome, either in terms of a direct fiscal impact or of having to redraft legislation or change national practices. This follows from the fact that a government department or agency is a party to around 80% of cases referred.[14] The government may alternatively wish to avoid distributional outcomes or financial impacts on private companies. In *Preston*, for instance—a case on the extension of occupational pension schemes to part-time workers—the UK government expressly referred to the potential effects on employers and pension schemes.[15]

[14] In 2006, for instance, 125 of 156 preliminary references (80%) had one or more governmental bodies as party.
[15] Case C-78/98 *Preston* EU:C:2000:247.

A member-state government also has an interest in the speedy resolution of national cases, particularly but not only those to which it is a party. That the efficiency of the Court in resolving preliminary references has become a concern for governments is evidenced by two reports issued by the UK House of Lords' European Union Committee on the workload of the Court, and the associated parliamentary debates.[16] Lord Howell of Guildford, then Minister of State at the Foreign and Commonwealth Office, stated that 'the delay resulting from this backlog of cases is bad for British businesses' while Lord Marks referred to 'delay, inefficiency and frustration for litigants and for business.'[17] It is evidently in a government's interest to promote the efficiency of the Court by making clear the facts of a case in their written pleadings and, if necessary, at the hearing. Speed and accuracy may, however, conflict with each other. Absent the full facts of a case, the Court may confine its judgment to general remarks and remit consideration of the detailed facts to the referring national court—as, of course, it should. In *UPC Telekabel Wien*, the Advocate General made this clear:

> Having regard … to the incomplete clarification of the facts and lack of particulars regarding the specific measure in the present case, it is neither appropriate nor possible to undertake a full examination of the necessity and proportionality here. Rather, the national court can only be provided with a few considerations. Moreover, these by no means constitute an exhaustive list of the factors to be weighed. Rather, the national court must fully weigh up all the relevant facts and circumstances of the specific case.[18]

In these circumstances, a less well-informed Court would seem to be a more efficient, or at least a speedier, Court.

A Member State will commonly have a direct interest in national cases to which its government is a party, but also in other Member States' cases because of the *erga omnes* effect of the Court's rulings. An example of such a case, which raised not just issues of constitutional principle but the likelihood of legislative changes in every Member State, is *Metock*.[19] Advocate General Poiares Maduro observed, 'The constitutional significance of the subject explains the liveliness of the

[16] House of Lords European Union Committee, 'European Union Committee - Fourteenth Report: The Workload of the Court of Justice of the European Union' (2011); House of Lords European Union Committee, 'Workload of the Court of Justice of the European Union: Follow-Up Report HL Paper 163' (2013).

[17] HL Deb 23 July 2012 cols 564, 567.

[18] Case C-314/12 *UPC Telekabel Wien* EU:C:2013:781, Opinion of AG Cruz Villalón, para 104.

[19] Case C-127/08 *Metock* EU:C:2008:449.

debate, with no less than ten Member States intervening … to challenge the interpretation put forward by the applicants in the main proceedings and the Commission.'[20] As noted earlier, all ten did indeed have to alter national legislation as a result of the Court's judgment.

A case does not, of course, have to concern matters of principle to have consequences for the other Member States: a decision on a customs classification may affect the income of other Member States that manufacture similar goods, and a finding that a product violates a protected geographical designation may harm national producers. In *Prosciutto di Parma*, for instance, in which a British company was accused of violating the terms of the protected geographical designation for Parma ham by slicing and packaging it in the UK, the French and Spanish governments submitted observations agreeing with Italy's position that Parma ham could only be packaged in its area of origin—on the face of it, a measure having equivalent effect to a quantitative restriction. This was presumably because both countries have national products that are similarly required to be packaged, as well as produced, in a defined geographical area.[21]

There are also cases in which a Member State's interest in a case arising in another Member State is more direct. In *Gambazzi*, for instance, a case on the recognition and enforcement in Italy of an English judgment, the Court appears to have relied on the UK's observations to understand the relevant issues of English civil procedure.[22] This is less than clear from the judgment but is evident from the UK's observations, which clarify an unclear order for reference. The UK and Italian written observations in the case are among the rare examples that are available online, having been released in response to a Freedom of Information request.[23]

Gambazzi is an example of a case where the direct interests of two Member States conflicted: Italy wished not to recognise the English court judgment as a matter of policy. Such conflicts of interest are not uncommon and lead to a difficulty with the simple political-pressure model: assuming that the Court's decisions are indeed constrained by the expressed preferences of governments, from which Member State(s) should it take its cue? Alter suggests that the Court is most likely to follow those Member States from which it is perceived as getting the most support,

[20] Case C-127/08 *Metock* EU:C:2008:33, Opinion of AG Poiares Maduro, para 1.

[21] Case C-108/01*Consorzio del Prosciutto di Parma* EU:C:2003:296, Report for the Hearing.

[22] Case C-394/07 *Gambazzi* EU:C:2009:219, para 11.

[23] Documents obtained by Koji Takahashi <http://conflictoflaws.net/News/2009/11/UK-Written-Observations_P1.pdf> accessed 3 August 2020.

i.e. Germany and the Netherlands.[24] Conant's 2007 review article draws attention, however, to considerable controversy about the relative influence of different Member States, this controversy concerning everything from the validity of different statistical analyses of the case law to the overarching models chosen.[25] The one thing that appears to be agreed upon is that Member States' observations do stand as expressions of national interests.

Arabadjiev comments that the Court fully expects Member States to defend their national interests in their observations, but also expects them not to depart from their duty of sincere cooperation under Article 4(3) TEU: 'Thus, even if the government is expected to defend its national interests, it is also expected to act in good faith.'[26]

2. A government has a preferred answer on a technical issue

The term 'technical issue' is far from having a legal definition, but despite it having only been used twice by the Court (by AG Szpunar in a copyright case[27] and by AG Cosmas in a case on acceptable terminology on food labels[28]) it can be taken to denote a detailed criterion against which an entity's compliance with the law may be measured. It may be difficult to determine if a Member State genuinely has no financial interest in the resolution of a technical issue. As noted above, most apparently technical decisions do have immediate financial consequences for governments or effects on their companies. Even if there are no financial or political consequences, a government may simply defend its current procedures in the hopes of not having to change them: see, for example, the account of member-state observations (plus those of the parties and Commission) in AG Cruz Villalón's Opinion in *Bara*, a case in which the Romanian government sought to defend its data-protection procedures.[29] This equally applies to suggesting answers in other states' cases where those states have similar national provisions. Nevertheless, just as it appears that Member States may make observations in support of clarifying the case law when there is no immediate benefit to them, states may proffer their understanding of a technical issue when they appear to have nothing at stake.

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[24] Karen J Alter, 'Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice' (2003) 52 International Organization 121, 144.

[25] Lisa Conant, 'Review Article: The Politics of Legal Integration' (2007) 45 JCMS 45.

[26] Alexander Arabadjiev, 'Influencing Luxembourg : UK Interventions in Preliminary Ruling Proceedings (Speech given at University of Cambridge, 5 October 2014)' 4.

[27] Case C-470/14 *EGEDA* EU:C:2016:24, Opinion of AG Szpunar, para 26.

[28] Case C-33/97 *Colim* EU:C:1998:76, Opinion of AG Cosmas.

[29] Case C-201/14 *Bara* EU:C:2015:461, Opinion of AG Cruz Villalón, paras 31-47.

3. A government has a preferred interpretation of a provision or principle of EU law

Situations where a government has (or probably has) an interest in a case's outcome should be distinguished from those where the result of the case is unlikely to result in financial or legislative embarrassment, but a Member State still has a preferred answer to the question(s) referred. Such preferences may be directed at the detail of EU provisions or general principles, or both.

The possibility of such preferences being wholly disinterested is raised here mainly to be dismissed. It is conceivable that a Member State's preferred answer may simply be a matter of legal logic. However, it is more likely that a case might be relevant to an issue of particular national concern—whether ideological, party-political or constitutional—or that the case falls into what could be called a legal-development arc in which a Member State is particularly interested. The most likely scenario is one in which both legal and policy concerns are raised. Dederke and Naurin offer some guidelines in distinguishing between a Member State's political or policy views and its views on the legal issues.[30] They suggest that legal salience may be measured by the content of each case in terms of important legal doctrines such as direct effect and sovereignty, or alternatively by how frequently each case is cited subsequently. For political salience, they score cases based on how controversial an issue appears to have been during the EU's legislative process.

It should be noted that governments may not necessarily only intervene because they are afraid that the Court would otherwise reach an unsatisfactory conclusion; they may, in fact, expect the Court to arrive at their preferred outcome but wish to 'future-proof' the decision by ensuring that the Court's legal reasoning will withstand scrutiny.

Before discussing these (not always distinguishable) situations, it is worth remembering that a government may be restricted from discussing issues that concern it even when a case appears to raise them. There are significant limits to the scope of the issues that the Court will consider if the referring national court did not raise them. However, the Court has shown itself to be more ready to discuss principles of EU law that arise out of an order for reference than to consider new questions.

[30] Julian Dederke and Daniel Naurin, 'Friends of the Court? Why EU Governments File Observations before the Court of Justice' (2018) 57 European Journal of Political Research 867, 873.

An example of a case where a government might be responding only to the legal logic of a case, or to be disinterestedly assisting the court, was *Melloni*.[31] Arabadjiev suggests that the UK was acting as a '"neutral" and "unbiased" … amicus curiae' in the case, which concerned the European Arrest Warrant and, in particular, the perennial question of whether a national court could apply a higher standard of fundamental rights protection than that afforded by the Charter. Arabadjiev argues that the UK's submission favoured a more expansive interpretation of the Charter than 'the narrow national interest' would imply and 'thus acted as a special 'neutral' counsel to the Court.'[32] It is difficult to distinguish this motivation from no 11 below, in which it is argued that a Member State may intervene in support of the overall health of the EU legal order.

In other cases, such supposed neutrality may reflect a Member State's finding itself in the position of having to make a strategic decision in a situation in which the interests of a national industry conflict with considerations of national sovereignty. For instance in *Nouvelles Frontières*, the UK's observations supported the direct effect of competition rules in the air transport industry—therefore speaking in favour of an extension of the Single Market—to the benefit of its industry but, at least theoretically, at the expense of its sovereignty.[33] In such circumstances, the Member State's motivation for making a submission can only be determined, if at all, by examining each case on its own merits. Governments' preferred interpretations of the EU's rules and principles are, as Cramér and others point out, revealed preferences that constitute valuable empirical data to studies of judicial politics.[34] It is unfortunate that, for the reasons enumerated in Chapter 2, their utility is restricted by their inaccessibility.

There is a further situation possible, in which a Member State might make a submission only because of a government's policy of doing so in all cases resulting from its national courts. As Arabadjiev comments, the contents of such submissions 'do … not necessarily reflect a government's litigation strategy as a whole', and provide less information than submissions in other states' cases.[35] Several countries have such a policy: Poland, Romania and Malta had made submissions in every case from their courts as at the end of 2013, and eight others in more than 90% (all newer Member States apart from Portugal and Finland). It is also worth noting that one

[31] Case C-399/11 *Melloni* EU:C:2013:107; Arabadjiev (n 26) 8.

[32] ibid, 9.

[33] Joined Cases 209 to 213/84 *Asjes* EU:C:1986:188.

[34] Per Cramér and others, *See You in Luxembourg? EU Governments´ Observations Under the Preliminary Reference Procedure* (Swedish Institute of European Policy Studies 2016).

[35] Arabadjiev (n 26) 2.

country, Bulgaria, had never intervened in another state's case. In the latter situation, more can perhaps be learnt from the national cases in which it did *not* make observations.

4. A government is acting in support of another Member State

A government may proffer an answer to a question in which it has no apparent direct interest because it is acting in support of another Member State. However, it may also do so because it is unsure if a result that is directly applicable to the referring Member State might also have legal implications at home, [36] or it may be motivated by a more theoretical concern over a point of law. In either of the latter situations, the Member State may have been waiting for an opportunity to express its preferences, but a relevant case may not have come before its courts. The need to wait for a more-or-less genuine national case is a persistent problem with using the preliminary reference system as a means of uploading national preferences. In any event, these motives are not mutually exclusive, and it may be impossible to determine which applies in a given case.

Research into the degree to which the Member States cooperate in their submissions is very limited. In an interview, the Joint Head of EU Litigation at the Cabinet Office commented that in the UK, the legal agents who prepare and deliver observations could be expected to have forged links with government departmental lawyers in other Member States. She said that there was lively correspondence within a network of EU litigation specialists, drawing each other's attention to upcoming cases of interest and making sure that everyone knew which Member States intended to make submissions and what line each wanted to take. If they found that the governments were in agreement about what answers to recommend to the questions referred, the group would calculate whether there was a sufficient weight of Member States already intending to intervene or whether others should be encouraged to add their voices.[37] Granger's interviews with legal agents elicited that at least some Member States occasionally held intergovernmental meetings to coordinate their positions, as did van Stralen's with civil servants. Although this does not imply that any of the participants were doing so without a national interest, it does make it clear that governments did consider their strategic relationships with the other Member States when planning their submissions, or lack of them.

Van Stralen's interviews with Dutch and Swedish civil servants elicited two very telling statements. One, by a member of the Dutch Ministry of Finance, was expressed in terms of

[36] Oliver Treib, 'Implementing and complying with EU governance outputs' (2004) 9 Living Reviews in European Governance 1, 13.

[37] Interview with the Joint Head of the EU Litigation Unit, Shasa Behzadi Spencer, 23 July 2014.

diplomatic tact: they said 'if the Netherlands does not show up to support another Member State in tax cases, it is effectively a signal that the Netherlands thinks that Member State's legislation is wrong.'[38] The use of such a signal is predicated on other Member States' *expectation* of support from the Netherlands. Another of van Stralen's interviewees stated that the Dutch environment ministry occasionally helped other Member States by suggesting legal arguments to support their cases, but that this occurred chiefly in cases in which the Netherlands did not intend to participate. This could be taken as an example of the Dutch government supporting another Member State, but it also suggests that the ministry recognises a third option besides 'make submission' and 'do not make submission', which is 'support another country's submission'. Far from offering disinterested support, the Netherlands could be said to be soliciting help from the other Member State in a case of intermediate importance to it.[39]

More generally, Granger's interviews with government legal agents elicited references to cooperation between the agents of Belgium, Denmark, Finland, Sweden and the United Kingdom.[40]

Cooperation between the Member States may not only be to their mutual benefit but may be useful in conveying their consensus to the Court or—where there is more than one 'camp'—to allow the Court to assess the differing opinions.

5. A government feels the case is relevant to national constitutional interests

It is possible to argue that the preliminary reference procedure provides an opportunity for some kind of constitutional impact assessment of EU legislation by the Member States. The result of such an assessment might be of theoretical interest to the Court, but it would mainly be of importance to the Member States. However, it is not clear that governments invariably recognise this opportunity or, if they do, that they avail themselves of it.

Although many cases are relevant to national constitutional interests, it can be argued that a 'constitutional' case is one that considers the three-way legal relationship between states, the EU and citizens, in some general, overarching manner, and where the relationship falls within the scope of the Treaties. Constitutional issues may, therefore, range from specific questions of national sovereignty, the supremacy of EU law, defining the proper limits of judicial power, and

[38] Stralen (n 1).

[39] Stralen (n 1) 34.

[40] Marie-Pierre F Granger, 'When governments go to Luxembourg ... the influence of governments on the Court of Justice' (2004) 29 ELR 3, 14 and fn 79.

state liability to, for instance, the Court's fundamental rights jurisprudence. Matters of subsidiarity and the procedural autonomy of the Member States also fall under this heading. However, it is rare for these issues to be mentioned in the order for reference; instead, they are usually uncovered by the Court.

While doctrinal accounts of EU law concentrate on individual 'constitutional' cases through which the Court has expounded constitutional doctrine and expanded the reach of EU law, those cases are not necessarily recognised immediately—least of all by governments. Some cases that are now treated as central to the constitutional narrative of EU law seem to have arrived at the Court entirely beneath Member States' radar: *Stauder v Ulm*, *Ratti* and *Marleasing*, for instance, received no state observations at all, and *Mangold* only one.[41] These figures should be considered in the context of an overall rate of Member State intervention of 79%.[42] It might be argued that these significant decisions simply took governments by surprise, or occasionally that governments disbelieved that a particular conclusion was possible.[43] However, an analysis of member-state governments' observations does suggest that the concerns of those whose task it is to make submissions to the Court are more likely to reflect government policy at the level of the dispute, or to defend national procedural autonomy, than constitutional considerations. An example of the latter would be cases that hinge on whether national procedural rules may place time-limits on the exercise of rights under a Directive.[44]

As an aside, it could be argued that this apparent concentration on matters of practicality rather than principle tends to support the theory that government observations form an aspect of the less consciously directed neofunctionalist model, rather than being evidence of intergovernmentalism.

In other cases, Member States do anticipate that a constitutional issue might be addressed and may even see an opportunity to force into the open an issue that the Court did not intend to discuss. An example of the latter is the UK's observations in *Pringle*, which were chiefly directed not at the question referred but at encouraging the Court to make a statement about the scope of the simplified revision procedure.[45]

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[41] Case 29/69 *Stauder v Ulm* EU:C:1969:57; Case 148/78 *Ratti* EU:C:1979:110; Case C-106/89 *Marleasing* EU:C:1990:395; Case C-144/04 *Mangold* EU:C:2005:709.

[42] 4,051 out of 5,103 cases for which judgments were available at the end of 2013.

[43] As in, apparently, *Mangold* (per Dashwood).

[44] See e.g. Case C-63/08 *Pontin* EU:C:2009:666 where the Luxembourgish government defended such time-limits; Case C-105/14 *Taricco* EU:C:2015:555.

[45] Case C-370/12 *Pringle* EU:C:2012:756 (ibid).

It is not surprising that Member States might wish to influence the outcome of constitutional cases. What requires explanation is that they do not make the attempt more often. One possible argument is that, in cases where governments have challenged constitutional developments via Court proceedings, they have tended to fail. Stein, in his landmark 1981 paper on the Court, looked at eleven such cases in which governments had submitted observations and found that in ten out of the eleven, governments had argued against the development being contemplated (and supported by the Commission). In all eleven, the Court followed the Commission.[46] It is unclear to what extent this finding is particular to constitutional cases; Stone Sweet and Brunell have found that the statistically most substantial influence on the Court's judgments, in general, is the position of the Commission.[47] Failure may in any case not be absolute; Arabadjiev observes that 'an argument [that] failed to change the outcome of a given case, might have influenced the Court in a different way, for example by adding a nuance to its reasons or by omitting certain considerations which could have otherwise been made.'[48] It is also worth noting that the Court does not necessarily answer all the questions referred and may prune out legal arguments relating to questions it does not wish to answer. Thus some member-state observations will be disregarded on those grounds alone.

Whatever the reason for Member States' apparent reluctance, a satisfactory model of the relationship between member-state governments and the Court must take into account this relative dearth of observations in constitutional cases. Nevertheless, constitutional issues form the backbone of the narrative on EU law and are looked at in more detail below.

5.1. Sovereignty, subsidiarity and competence

As was noted above, it is necessary to have a convincing explanation for those occasions when member-state governments do *not* submit observations to the Court of Justice, despite apparently having a strong interest in so doing. Earlier chapters have considered reasons why some particular Member States rarely intervene. This particular sub-heading, however, looks at a legal principle that seems to garner fewer observations than might be expected from *all* Member States: that is, cases that pit national sovereignty against the supremacy of EU law. They are briefly compared and contrasted with cases on the related issues of subsidiarity and competence.

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[46] Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1, Table 1.

[47] Alec Stone Sweet and Thomas L Brunell, 'The European Court of Justice, State Noncompliance, and the Politics of Override' (2012) 106 American Political Science Review 204, 211.

[48] Arabadjiev (n 26) 3.

The limitations placed on national sovereignty by the Treaties were first articulated in *van Gend* and *Costa*, which received observations from Belgium, Germany and the Netherlands, and Italy, respectively. The same form of words ('The Community constitutes a new legal order, for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals') was repeated in *Cassis de Dijon*, which received two observations from the then nine Member States.[49] The immediate subject-matter of these cases—a customs classification, a lawyer's challenge to his electricity bill and the alcohol content of crème de cassis—might initially suggest that the Member States did not intervene because they failed to anticipate that issues of sovereignty might arise. However, the example of cases on state liability—which involves not just a challenge to the state's sole authority over its citizens but requires the state to compensate those that EU law regards it as having wronged—suggests that failure to anticipate the principles a case might uncover is not a complete explanation.

There were 39 decided cases on state liability up to the end of 2013, and every case received observations from at least one Member State. But in eight cases, no observation was submitted by the originating state, and the average number of interventions for all cases was 3.3. Bearing in mind that the founding case on state liability, *Francovich*,[50] reached the Court in 1990 when there were already twelve Member States, this is somewhat surprising. Nearly two-thirds of the submissions came from just five countries: the UK, Germany, Italy, Netherlands and France, whereas five countries made observations in only one case and eight in none. While the average number of interventions for cases on *all* topics over the same period was 2.1, some individual cases received as many as 14 from 15 Member States (*BASF*, on patents, and *Banco Popolare di Cremona* on turnover taxes).[51] Are national governments more concerned about the fine detail of patents and taxation than about their sovereignty? This is not to suggest that taxation is a matter without constitutional significance: as Granger notes, 'taxation is one of the last bastions of state sovereignty, and a significant policy tool.'[52] But government observations were generally

[49] Case 120/78 *Rewe-Zentral* EU:C:1979:42; observations from Germany (by request of the Court) and Denmark.

[50] Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci* EU:C:1991:428; *Francovich* itself drew 4 member-state submissions.

[51] Case C-44/98 *BASF* EU:C:1999:440; Case C-475/03 *Banca popolare di Cremona* EU:C:2006:629.

[52] Marie-Pierre Granger, 'States as Successful Litigants before the European Court Of Justice: Lessons from the "Repeat Players" of European Litigation' (2006) 2 Croatian Yearbook of European Law and Policy 27, 39.

expressed more in terms of procedural autonomy than of sovereignty per se.[53] An exception might be *Transportes Urbanos y Servicios Generales*, in which the Spanish government's observations were directed at the question of whether the Court was competent to examine the judgments of a Member State's *constitutional* court and hence its constitutional arrangements.[54] No other Member State submitted observations in that case.

Other examples of an unexpected scarcity of observations in cases that raised sovereignty questions include *Internationale Handelsgesellschaft* (two observations from six Member States)[55]; *Simmenthal* (1/9);[56] *Macarthys v Smith* (1/9);[57] *Von Colson* (3/10);[58] *Marleasing* (0/10);[59] *Foster v British Gas* (1/12);[60] and more recently *Landtová* (2/27).[61] The *Factortame* cases provide another illustration of this unpredictable response: *Factortame I*, which contains the critical supremacy decision, garnered two member-state observations from the then twelve Member States, from Ireland and the UK; *Factortame II* on the compatibility of the UK merchant shipping registration scheme with EU law, received seven observations.[62] *Factortame II* was one of the three cases (the others being *Brasserie du Pêcheur/Factortame III* on state liability and *Faccini Dori* on untransposed directives) that received observations from the highest percentage of Member States of all the 'constitutional' cases from 1961 to 2013, at seven from twelve states.[63] By contrast, the six cases that received observations from more than 90% of the existing Member States were on competition (three cases), VAT, IP and gambling.

A closely related issue to sovereignty is competence; indeed, the two may be difficult to distinguish in the wording of a given case. One of the most notable examples of member-state

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[53] See discussion in Case C-5/94 *R v MAFF, ex p Hedley Lomas (Ireland) Ltd* EU:C:1995:193, Opinion of AG Léger.

[54] Case C-118/08 *Transportes Urbanos* EU:C:2010:39.

[55] Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114.

[56] Case 106/77 *Simmenthal* EU:C:1978:49

[57] Case 129/79 *Macarthys v Smith* EU:C:1980:103.

[58] Case 14/83 *Von Colson* EU:C:1984:153.

[59] Case C-106/89 *Marleasing* EU:C:1990:395.

[60] Case C-188/89 *Foster v British Gas* EU:C:1990:313.

[61] Case C-399/09 *Landtová* EU:C:2011:415.

[62] Case C-213/89 *R v Secretary of State for Transport, ex p Factortame* EU:C:1990:257; Case C-221/89 *R v Secretary of State for Transport, ex p Factortame* EU:C:1991:320.

[63] Joined cases C-46/93 and C-48/93 *Brasserie du pêcheur* & *R v Secretary of State for Transport, ex p Factortame* EU:C:1996:79; Case C-91/92 *Faccini Dori* EU:C:1994:292.

participation is in Opinion 2/15 of the Court,[64] on whether the EU had sole competence to reach a trade agreement with Singapore. 24 of the 28 Member States submitted written observations and one further state participated in the hearing, leaving only three states not having intervened.[65] Other cases that generate a great deal of member-state concern are those on the principle of 'Kompetenz-kompetenz' with Member States repeatedly asserting the right of their constitutional courts to decide who has jurisdiction over matters, particularly, of fundamental rights.

The majority of references to competence are, however, largely incidental. The issue of competence arises at least in passing in some 13% of preliminary references. However, the pattern of member-state submissions in these cases does not differ significantly from that overall: they drew observations from an average of 14% of the Member States. In the cases which drew the most submissions (73% of the then fifteen Member States in *British American Tobacco* on tobacco marketing rules and *Vanbraekel* on hospital treatment in other Member States), the main topics were what attracted attention.[66] Sixteen other cases in which competence was relevant drew observations from more than half of the Member States, including *Factortame II* and *Faccini Dori*, *Reyners* on establishment and *Viking* and *Laval* on posted workers; others were competition, tax and IP cases.[67] Meanwhile, 8% of the cases received no observations at all.

There are several possible explanations for an apparent relative lack of member-state engagement in sovereignty issues as compared with more practical matters. They include the likelihood that issues of principle are unlikely to be heralded in an order for reference and the fact that the civil servants in individual ministries are more likely to be engaged with EU law at the level of departmental policy than at that of overarching principle. The important point is that any convincing model of Member State interaction with the Court of Justice should be able to accommodate this finding.

5.2. National balance of power

Another related constitutional issue upon which governments may wish to be heard is the balance of power between different domestic institutions and actors. Börzel and Risse observe that there may be 'institutional misfit' between the structure of governance at the EU level and national

[64] Opinion 2/15 concerning the competence of the EU to conclude the Free Trade Agreement with Singapore (EUSFTA) EU:C:2017:376.

[65] Non-participating Member States were Croatia, Estonia and Sweden.

[66] Case C-491/01 *British American Tobacco* EU:C:2002:741; Case C-368/98 *Vanbraekel* EU:C:2001:400.

[67] Case 2/74 *Reyners* EU:C:1974:68; Case C-341/05 *Laval* ECLI:EU:C:2007:772; Case C-438/05 *Viking* ECLI:EU:C:2007:772.

rules, procedures and constitutional conventions, which may disturb the domestic balance of power. In particular, they argue that EU decision-making empowers governments at the expense of other domestic actors.[68] At the same time, the preliminary reference procedure offers an opportunity for the judiciary and governments to assert themselves at the expense of the legislature. This takes place within a framework in which the institutions and actors at the supranational and national levels are linked, and within which their relationships may be elucidated and adjusted if an opportunity arises. The ability to create such an opportunity, however restricted it may be, can be argued to empower individuals and pressure groups vis-à-vis governments. Hence governments may either wish to argue in support of a shift of power towards themselves, or in favour of the status quo, versus (for example) a pressure group.

As with questions of sovereignty, however, concerns over the domestic balance of power may both impel governments to intervene or, paradoxically, make them reluctant to do so. The mere existence of the preliminary reference procedure is uncomfortable for some Member States in that it can be perceived as the exercising by national courts of a power of judicial review over the other branches of government. This is particularly so in countries where the courts have no power of review of primary legislation, such as the UK, or where a majoritarian tradition has generally prevented such a power being exercised.[69] In the case of Denmark, for instance, Rytter and Wind argue that the legislature is regarded as the primary legitimate source of authority and it is regarded as unacceptable that 'non-elected quasi-guardians'—the judiciary—should have the power to impose limits on the actions of a legislature elected by popular mandate.[70] Thus, they argue, Danish judges have been relatively unwilling to refer questions to the Court of Justice of their own initiative.[71] Wind, Martinsen and Rotger use this as an explanation for Denmark's low *absolute* rate of making preliminary references—Danish courts only having referred 131 cases in the period to the UK's 461—but reference rates are affected by many factors, including a country's population and hence its level of judicial activity.[72] Danish courts have referred more

[68] Tanja A Börzel and Thomas Risse, 'When Europe Hits Home: Europeanization and Domestic Change' (*EIOP European Integration Online Papers*, 2000) <http://eiop.or.at/eiop/texte/2000-015a.htm> accessed 10 August 2020.

[69] Karen J Alter, 'The European Court's Political Power: The Emergence of an Authoritative International Court in the European Union', *The European Court's Political Power: Selected Essays* (OUP 2009) 95–96.

[70] Jens Elo Rytter and Marlene Wind, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms' (2011) 9 International Journal of Constitutional Law 470, 473, citing Robert A Dahl, *Democracy and its Critics* (Yale University Press 1989) 154.

[71] Rytter and Wind (n 70) 491.

[72] Marlene Wind, Dorte Sindbjerg Martinsen and Gabriel Pons Rotger, 'The Uneven Legal Push for Europe: Questioning Variation When National Courts Go to Europe' (2009) 10 European Union Politics 63.

cases *per head* than the UK. It can be argued that Denmark's adherence to a particular understanding of constitutional propriety serves as a better explanation for the government's low rate of submitting observations to the Court. Thus it attempts to preserve its domestic balance of power more by non-participation than by defending it before the Court of Justice.

A consequence of the fact that a government ministry is a party in the majority of referrals is that a government may feel the need to defend itself at the level of the Court of Justice from *its own national court's* understanding of the case. In most instances, the government's assessment of the court's position will be educated guesswork. However, in some jurisdictions, a national court may be asked for a 'preliminary opinion' on (for instance) the legality of a proposed change to legislation. A preliminary opinion may itself then be the subject of a preliminary reference.[73] Nyikos finds that, where such preliminary opinions have been referred, the government's observations disagree with the national court's view about 70% of the time. She concludes, 'Hence, governments are driven at least in part to submit observations by disagreement with and reactions to the national court's position.'[74]

Meanwhile, national courts may be inspired to refer questions to the Court based on their perception of the shortcomings of domestic law, and a government to submit observations in its defence. In *Taricco*, AG Kokott observed that 'contrary to the view taken by the Italian Government, the referring court is not prevented from making the systemic shortcoming of Italian criminal law … the subject-matter of a reference to the Court.'[75] The Italian government was here arguing that the Court of Justice had no jurisdiction over its system of limitation periods. In contrast, the national court argued that Italy was neglecting its obligation under EU law to provide for effective penalties in the event of tax fraud.

Another factor in the domestic balance of power is the relationship between the government and industry. While governments may put pressure on individual companies, the Court of Justice provides a more plausible forum for maintaining pressure on particular *sectors* of industry. One example is the gambling industry. As van den Bogaert and Cuyvers observe, 'gambling presents Member States with a dilemma: how to regulate an activity which is perceived as morally

[73] Such a preliminary opinion is distinct from a hypothetical question, on which the Court will not rule.

[74] Stacy A Nyikos, 'Strategic Interaction among Courts within the Preliminary Reference Process – Stage 1: National Court Preemptive Opinions' (2006) 45 European Journal of Political Research 527.

[75] Case C-105/14 *Taricco* EU:C:2015:293, Opinion of AG Kokott, para 48.

objectionable and socially harmful, yet which generates significant revenue … and seems impossible to prevent anyway.'[76]

Gambling is increasingly a cross-border, online activity and is the focus of criminal activity. Thus it is an industry that governments seek to regulate firmly. This is evident from the fact that no gambling cases have gone without government intervention and only 13% have had only one submission; in fact, the average gambling case receives observations from around a quarter of Member States. Some stand out as having attracted very high levels of interest indeed, notably two cases on lotteries: *Schindler*, which received observations from eleven out of twelve states and *Stoß* which received observations from thirteen of the then 27.[77] The most frequent intervener is Belgium—in over two-thirds of the cases—closely followed by Portugal and Germany. Both the importance of gambling issues and the less usual protagonists suggest that this is not just an area where the Member States feel that EU law needs to be elucidated, but one where the Member States are actively intervening to keep the industry in check.

As Larsson observes, '[i]f the decisions of judges affect policy and in effect change laws, they also change the rights and duties of the citizens of a polity, and redistribute resources among them.'[78] It can be argued that governments are aware of the Court's potential for reaching decisions in favour of other societal actors beside themselves, and one motive for governments' submission of observations is to counteract this potential redistribution of power and resources. Effectively, observations take their place among the checks and balances of a working political system.

5.3. The balance of power between Member States and the Court of Justice itself

While the potential effect of Court proceedings on the balance of power within a Member State is rarely considered, challenges to the balance of power between the Member States and the EU preoccupy the literature. The question of the supremacy of EU law versus national sovereignty was considered at the beginning of this section, but the specific issue of the perceived empowerment of the Court of Justice vis-à-vis Member States was not discussed.

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[76] Stefaan Van den Bogaert and Armin Cuyvers, '"Money for Nothing": The Case Law of the EU Court of Justice on the Regulation of Gambling' (2011) 48 CML Rev 1175, 1175.

[77] Case C-275/92 *Schindler* EU:C:1994:119; Joined cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07 *Stoß* EU:C:2010:504.

[78] Olof Larsson, 'Minoritarian Activism: Judicial Politics in the European Union' (PhD Thesis, University of Gothenburg 2015).

There is an extensive literature on how the Court is empowered by its role as the final interpreter the Treaties.[79] As Shapiro points out, entities bound by an incomplete contract such as the Treaties must commit in advance to the jurisdiction of the body that interprets the treaty and fills in its lacunae.[80] This does not, however, prevent governments from seeking to limit this commitment and to try and take advantage of third-party dispute resolution without allowing the Court to trespass beyond the boundaries of those disputes.

The literature of the Court's supposedly expansionist law-making will not be reviewed here. What is clear is that authors have supposed the Member States to be trying to limit the Court's role right from the first preliminary reference case to reach the Court. In that first case, *Bosch*, four of the six Member States submitted observations, with the French government attempting to employ a typical method of attack: to argue that the Court lacked jurisdiction.[81] The same argument was used in *van Gend*, in which the Belgian, German and Dutch governments argued that, while the Court could decide on the interpretation of the Treaty of Rome, it had no jurisdiction over its application in an individual case—and, as a consequence, that Treaty provisions could not have direct effect.[82] Interestingly, Davies notes that the German Justice Ministry 'agree[d] with the rejection of direct effect … but stated that for clarity's sake, it would be a good idea to issue the ECJ a government statement so that the court would feel obliged to explain its reasoning more fully.'[83] This alludes to a motive for submitting observations that will be discussed in section 7.

Subsequently, Member States' hostility to the doctrine simmered down. Alter argues that conflict on this point was avoided in the context of infringement cases by the Commission's concentrating

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[79] See, among others, Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1; Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff 1986); Anne-Marie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 International Organization 41; Neil Walker, 'The Shifting Foundations of the European Union Constitution' (2012) University of Edinburgh School of Law Research Paper Series 2012/18 and, by way of contrast, Anthony Arnull, 'Judging The New Europe' [1994] European Law Review 3, 4; Andreas Grimmel, 'This Is Not Life As It Is Lived Here: The Court Of Justice of the EU and the Myth of Judicial Activism in the Foundational Period of Integration through Law' (2014) 7 European Journal of Legal Studies 61.

[80] Martin Shapiro, 'The European Court of Justice' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (1st edn, OUP 1999) 321.

[81] Case 13/61 *Bosch* EU:C:1962:11.

[82] Case 26/62 *Van Gend en Loos* EU:C:1962:42, Opinion of AG Roemer, 20; Koen Lenaerts, 'Some Thoughts about the Interaction between Judges and Politicians' [1992] The University of Chicago Legal Forum 93.

[83] Bill Davies, 'Meek Acceptance The West German Ministries' Reaction to the Van Gend En Loos and Costa Decisions' (2008) 14 Journal of European Integration History 57.

on cases with low material impact that did not 'arouse political passions.'[84] The same could be argued to apply to preliminary reference cases, where the quotidian nature of the topics is rarely such as to rouse political ire. Weiler argues that preliminary reference cases gave the Member States little foothold for battling the doctrine of direct effect because they were forced to make their arguments in a judicial arena in which precedent on the one hand, and a presumption that governments would stand by their declarations on the other, discouraged diplomatic manoeuvring.[85] The reception of the doctrine of direct effect became, in de Witte's words, 'rather successful, on the whole'. [86] Any remaining challenges by governments have been directed less at the Court's jurisdiction and more at the scope of the doctrine's application, in particular that a case refers to a 'purely internal situation'. Incidentally, the argument that a case refers to a purely internal situation may also be put by the Court in refusing jurisdiction: see, for instance, the 2018 case of *Bán*.[87]

6. A case is relevant to a government's economic or political/policy preferences

Governments may tend to intervene in individual cases that they see as relevant to their specific economic or political preferences. Mattli and Slaughter identify a desire to support one economic sector over another, to put economic interests over social interests or to defend the rights of their nationals over those of nationals of other Member States.[88] A decision about whether to intervene may involve the government balancing multiple goals—for example, good industrial relations versus promotion of a national industry—in the context of a court that is also balancing different considerations and is perceived to have different priorities from the Member States.[89] The Court has found itself asked to step into economic areas that Member States are used to regarding as wholly within their purview, such as industrial relations.[90] Member States may well feel compelled to defend the balance of power between themselves and the Court in these just as in

[84] Karen J Alter, 'Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice', *The European Court's Political Power: Selected Essays* (OUP 1998) 120.

[85] Joseph HH Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors' (1994) 26 Comparative Political Studies 518.

[86] Bruno de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 347.

[87] Case C-24/18 *Bán* EU:C:2018:376.

[88] Walter Mattli and Anne-Marie Slaughter, 'Law and Politics in the European Union: A Reply to Garrett' (1995) 49 International Organization 183, 184.

[89] Joxerramon Bengoetxea, Neil MacCormick and Leonor Moral Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in Gráinne De Búrca and Joseph HH Weiler (eds), *The European Court of Justice* (OUP 2001) 65.

[90] R Daniel Kelemen, 'Eurolegalism and Democracy' (2012) 50 JCMS 55, 62.

more abstract constitutional cases.[91] They also, as Greer and Martin de Almagro Iniesta point out, have an incentive to avoid political change and instead to invest effort in maintaining their policies and politics.[92]

An example of a policy area that is of high importance to Member States is, unsurprisingly, citizenship. Over half of Member States demonstrate a higher likelihood of participating in citizenship cases than their average across all the substantive topics, and fourteen, including two of the three 1973 accession states, participated more than twice as often.

Denmark, which has strong national concerns about citizenship, made submissions in 32.6% of the cases on citizenship that were referred to the Court, five times its overall average of 6.4%. Ireland did so in 16.3% of citizenship cases, nearly four times its average of 4.5%. The UK was also more active in these cases, making observations in 45.3% of citizenship cases, nearly twice its average of 23.5%, plus 30% of free movement cases and 42% of asylum cases. Despite the high salience of EU citizenship issues to the 1973 states, there were only three cases in which the three all submitted observations: *Ibrahim*, *McCarthy* and *Dereci*.[93] All asked important general questions about immigration law and they received four, five and eight member-state submissions respectively.

There may also be areas that are of significance to a Member State as a matter of more disinterested national policy, such as transparency to Sweden.[94] Although the access-to-documents cases in which transparency has been the central issue have been direct actions, van Stralen, who interviewed Dutch and Swedish civil servants about their countries' submission policies, says:

> [S]everal Swedish interviewees mentioned the furthering of transparency within the EU as a reason to submit observations. This commitment to transparency can in and

[91] Michael Blauberger, 'With Luxembourg in Mind … the Remaking of National Policies in the Face of ECJ Jurisprudence' (2012) 19 Journal of European Public Policy 109, 123.

[92] Scott L Greer and Maria Martín de Almagro Iniesta, 'How Bureaucracies Listen to Courts: Bureaucratized Calculations and European Law' (2014) 39 Law and Social Inquiry 361, 367.

[93] Case C-310/08 *Ibrahim* EU:C:2010:80; Case C-434/09 *McCarthy* EU:C:2011:277; Case C-256/11 *Dereci* EU:C:2011:734.

[94] Leonor Rossi and Patricia Vinagre e Silva, *Public Access to Documents in the EU* (Hart 2017) 211. Rossi observes that intervening in access cases is the only avenue by which Member States can protest the EU's right, as 'guardian' of documents, to release documents that a Member State would rather it did not.

of itself, motivate a Swedish submission: 'transparency, that's very important so if any case concerns this principle of transparency, we enter and defend it.'[95]

7. A government feels a case offers an opportunity to clarify the law

Member States may submit observations that convey their belief that an area of law is in urgent need of clarification. Depending on the scope of the uncertainty, governments may be unable to find an intelligible framework of EU law within which to operate, or they may need to establish certainty concerning a single point of law that is of concern to a government, its companies or citizens. Many such observations are of reciprocal benefit to the Court and the Member State.

An example of an area of law within which the Member States have sought to establish legal certainty is that of the interpretation of national laws in the light of Directive 93/13 EEC, the Directive on Unfair Terms in Consumer Contracts. It seems unlikely that the institutions or the Member States originally envisaged the importance that the Directive, a solid Single Market provision, would attain in the aftermath of the financial crisis of 2008 onwards. The number of applications for preliminary rulings on the Directive multiplied from only one in its first decade to 46—mainly on consumer credit—in the last five years of this study, resulting in 27 judgments of the Court. Although 17 of these cases drew either one or two observations, one case received six and one, *CHS Tour Services*, seven.[96] The Member States most keen to be involved were Spain, which submitted observations in thirteen cases, Germany (10), Hungary (8) and Austria (7). Denmark and the UK submitted observations in one case each and Ireland in none.

These consumer protection cases demonstrate that a government may submit observations, not because its departments, or its companies or citizens, are concerned in a case, but because it anticipates that problems might arise in the future if the law is not clarified. Member-state concerns may be directed towards an entire area of the law or a single legal point. The two cases in which Denmark and the UK submitted observations illustrate the Member States' drive towards legal certainty. Denmark was one of four Member States that submitted observations in *Hypoteční banka*, which concerned Czech court procedures that enabled actions against foreign nationals whose whereabouts were unknown.[97] The four intervening member-state governments agreed, and the Court concluded, that the Czech procedures in question were indeed conducive to legal certainty. *CHS Tour Services*, in which the UK made observations, arose from a dispute

[95] Stralen (n 1) 38.

[96] Case C-435/11 *CHS Tour Services* EU:C:2013:574.

[97] Case C-327/10 *Hypoteční banka* EU:C:2011:745.

between two Austrian companies and otherwise affected only their exclusively British customers. However, in addition to Austria and the UK, observations on the interpretation of EU consumer law provisions were submitted by Germany, Italy, Hungary, Poland and Sweden.

This line of cases has continued beyond the period of this study, mainly examining the legality of national provisions that make it difficult for courts to assess the compliance of consumer credit agreements with the Directive.[98] It can be argued that consumers now experience better protection as a result of greater consistency in Member States' compliance with the Directive—itself partly a result of greater legal certainty.

8. A government wishes to guide the evolution of EU law

A closely related category is where Member States are motivated to make submissions by a wish to guide an evolving area of the law in its preferred direction, or contrarily hope to limit the Court's jurisdiction over a subject area. More generally, a Member State may see a case as providing an opportunity to upload its specific ideological, economic or political preferences. This category of motivation, and the concept of uploading, will be discussed at more length in Chapter 7.

This is the most specifically political category of submissions. As such, it is one in which the Member States often break up into opposing groupings in their observations. A classic example of this may be found in the observations submitted in the *Viking* and *Laval* cases.[99] These pitted the right of workers to take industrial action, as enshrined in Article 28 of the Charter of Fundamental Rights and elsewhere, against the freedom to provide services and the freedom of establishment. In both cases, the industrial action was aimed at preventing a company engaging in a form of social dumping, undercutting wages and employment conditions in an older Member State by seeking to employ workers from a lower-wage Member State.

In *Viking*, in which a company wished to reflag a ferry from Finland to Estonia to take advantage of lower wages in Estonia, the Court received thirteen submissions from Member States plus observations from Norway. *Laval*, which concerned workers posted from Latvia to Sweden, received fourteen, plus observations from Iceland, Norway and the EFTA Surveillance Authority. In both, there was a striking contrast in the answers proposed by the 2004 accession group and the older Member States.

[98] See e.g. Case C-377/14 *Radlinger* EU:C:2016:283.

[99] Case C-438/05 *Viking* EU:C:2007:772; Case C-341/05 *Laval* EU:C:2007:809.

In *Laval*, where the contents of the observations can only be determined from the AG's Opinion, it is apparent that the older states (plus Iceland and Norway) argued that the right to take collective action was a fundamental right outside the scope of the Treaties.[100] Opposing submissions came from Czechia, Estonia, Latvia, Lithuania and Poland. The same pattern can be seen in *Viking*, for which the Report for the Hearing is available. The older Member States and Norway produced several arguments: that the right to take collective action was outside the scope of the Treaties; that either collective action could not count as a restriction for the purposes of Article 43, or that it was objectively justified, or that Article 43 did not, in any case, have horizontal direct effect. Czechia, Estonia, Latvia and Poland argued variously that collective action was not outside the scope of the Treaties, that it was a restriction under Article 43 and that that the Article had direct effect, but also that collective action in these cross-border situations was directly or indirectly discriminatory. Denmark's position was similar to that of the new Member States. It argued that, while the EU was not competent to regulate trade union action, action taken to prevent a company exercising its right of freedom of establishment by reflagging a ship was not protected collective action and therefore constituted a restriction under Article 43. The UK's main argument was that there *was* no fundamental right to take industrial action protected by EU law.

The government positions in both cases, although argued in terms of EU law, chiefly reflect economic and political considerations and, most notably in the case of the UK's observations, a long-standing policy position that is hostile to the provisions of the Charter. They are also characteristic of a general trend of conflicts between the submissions of newer and older Member States to which Larsson and Naurin, and Cramér and others, draw attention.[101]

Areas of conflict between the Member States have been studied more comprehensively in the context of legislation. Thomson, for instance, demonstrates that there is the least conflict in the areas of agriculture and the free movement of goods, and most in the areas of the free movement of labour and associated employment rights, and in issues of European integration.[102] Cramér and his collaborators echo these observations.

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[100] While *Laval* falls into the time period in which the Swedish Foreign Ministry collected Reports for the Hearing, the ministry did not include the observations in cases referred by *Swedish* courts.

[101] Olof Larsson and Daniel Naurin, 'Split Vision. Multi-Dimensionality in the International Legal Policy Space (American Political Science Association Annual Meeting, Philadelphia, September 2016)'; Cramér and others (n 34).

[102] Robert Thomson, 'Member States' Policy Positions', *Resolving Controversy in the European Union: Legislative Decision-Making before and after Enlargement* (CUP 2011).

This (hardly unexpected) continuity has been analysed statistically by Dederke and Naurin. They noted that, if a state had expressed a strong opinion in the Council, that opinion was more likely to surface in its observations.[103] This unsurprising continuity between Member States' policy positions at the legislative stage and their likelihood of submitting observations in those policy areas will be returned to in Chapter 7.

A Member State's strategy in these cases may be less than explicit. It may consist less in making legal arguments that state a government's position but instead in nudging the Court to categorise a case in a certain way, either by uncovering a broader issue lurking in a reference or in extracting what the Member State wishes to be the 'right' question. Alternatively, a state may try to deflect the Court away from a category that the member-state government would rather not see expanded or to exclude specific questions, usually based on jurisdiction.

9. A government sees political benefits in being seen to participate

In this chapter, the benefits to the Member States of participating in Court proceedings have mainly been expressed in terms of three things: financial benefits to governments and their national companies, the preservation of the legislative status quo, and the defence of governments' policy preferences. Each of these concrete benefits may gain a government political advantages at home and internationally. A governing party may also, however, act only to boost its political standing or prestige, with no expectation of a direct benefit. At home, it may act to maintain its standing within the current parliamentary session and with an eye to the next general election. It may also act in support of what Wendt describes as 'collective self-esteem', that is, the maintenance of national (as opposed to party) prestige.[104]

The topic of prestige is a wide one and has not been extensively discussed in the context of membership of the European Union. While a detailed consideration is outside the scope of this thesis, it is worth pointing to some issues that may be significant in governments' interactions with the Court of Justice. Member States' prestige is usually analysed as being won on a broad stage: being seen to take part in international law-making and being one of a group of states that assume a collective identity.[105] It can be argued that participation in the Court's proceedings contributes to these achievements not only by achieving results but simply by participating and

[103] Julian Dederke and Daniel Naurin, 'Friends of the Court? Why EU Governments File Observations before the Court of Justice' (2018) 57 European Journal of Political Research 867.

[104] Alexander Wendt, *Social Theory of International Politics (Cambridge Studies in International Relations)* (CUP 1999) 235-7.

[105] Wendt (n 104) 7.

being listened to. Dowding and Mergoupis link this to the concept of Voice, arguing that giving people (or, in this context, governments) a voice raises their self-esteem *and* their identification with the larger group.[106]

It is difficult to ascertain how reliably prestige can be turned into influence. However, Wendt's 'collective self-esteem' can arguably be linked to the degree to which a given Member State has what the Harvard political scientist Joseph Nye describes as 'soft power': the ability to achieve its diplomatic ends by co-opting favourable opinion.[107] This soft power may be brought to bear both *on* the EU and outside it, and exercised both as a nation state and as a Member State, i.e. as an individual country and within the collective scope of the EU's external relations.

Prestige is not just a concern of larger states: Novack, for instance, argues that national self-esteem is a motivator for Finland and Sweden in their relationships with the EU.[108] By contrast, Rytter and Wind, referring to the Court specifically, argue that Danish politicians have not seen the Court as 'a site for influence or policy-making'.[109] Granger notes that French agents have used possible damage to France's long-term reputation as a reason not to take certain positions in submissions to the Court.[110]

Whether the Member States' *domestic* audiences are aware of the positions taken by their governments is questionable. If the assumption is made that domestic audiences will only learn about their governments' actions via the press, it is possible to make some general observations about news coverage. First, the generally technical nature of the questions referred makes it difficult for the news media to spot upcoming issues that might, in principle, be of interest to their audiences. As a result, coverage of non-exceptional cases tends to be confined to legal or business journals or the relevant trade papers. In the UK, for instance, the Court is mentioned around three times as often in The Economist than in the (apparently obsessed) Daily Mail. Second, the degree of coverage does vary from country to country: for instance, in his thorough examination of the reception of the Court's early jurisprudence in Germany, Davies demonstrates that there has been

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[106] Keith Dowding, Peter John and Thanos Mergoupis, 'Exit, Voice and Loyalty: Analytic and Empirical Developments' (2000) 37 European Journal of Political Research 469, 492.

[107] Joseph S Nye, *Bound to Lead: The Changing Nature of American Power* (Basic Books 1990) 31–2.

[108] Jennifer Leigh Novack, 'New Kids on the European Block: Finnish and Swedish Adaptation to the European Union?' (PhD thesis LSE 2002).

[109] Rytter and Wind (n 70).

[110] Marie-Pierre F Granger, 'From the Margins of the European Legal Field: The Governments' Agents and Their Influence on the Development of European Union Law' in Antoine Vauchez and Bruno de Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Hart 2013) 62 fn 37.

significant coverage of EU law in the German press.[111] Third, the nature of the coverage depends on the political alignment of the publisher. Indeed, it could be argued that any action by a government that appears to conceptualise the EU in supranational terms, including acknowledging the authority of the Court of Justice, may outrage the Eurosceptic press.

Apart from in the work of Davies and Granger, there appears to have been little analysis of the political and diplomatic effects of Member States' mere participation at the Court of Justice. Granger asserts 'Having in mind the nature of political life, it does happen that, at times, governments' participation in ECJ proceedings is motivated only by the need to show domestic constituencies that they are trying to do something about it, without the government having any hope (or even desire) of winning the case or influencing case law.'[112] Granger argues that, for some countries, participation can be tied to the electoral cycle and thus favours participation only in cases where the government expects an immediate political return on its investment of resources; she identifies Luxembourg as a Member State where such a short-term advantage is the government's only motive in making its 'very occasional' observations.[113]

Davies argues that in Germany, there was a significant public discourse in the 1960s and 1970s concerning EU law and that this public discourse influenced the Federal Constitutional Court in its *Solange* judgment.[114] Davies bases his conclusions on an analysis of the news media of the day and identifies a critical awareness of EU law on the part of the general public, albeit framed in terms of the inferiority of EU law's fundamental rights protection to that guaranteed by the post-WW2 *Grundgesetz* or Basic Law. While Davies chiefly demonstrates that public opinion affected the interaction of the German legislature with EU law, he argues that the German government was undoubtedly concerned about the domestic reception of its actions concerning EU law in the 1960s and 1970s and provides some examples of pressure on the government from the press. For instance, he notes that, in response to German doubts after the *Costa* decision over the supremacy of EU law, *Die Welt* called upon the government to represent 'the German point of view' on EU

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[111] Bill Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949-1979* (CUP 2012).

[112] Marie-Pierre Granger, 'Governments in Luxembourg: How Do Governments Use EU Litigation to Protect National Policies or Influence EU Policy and Law-Making' (Paper presented at ECPR Fifth Pan-European Conference on EU Politics, Porto, 24-26 June 2010)' <https://www.semanticscholar.org/paper/Paper-1596%3A-Governments-in-Luxembourg%3A-How-Do-Use-Granger/d95b6c5e9d3014db20e65728bc7fc66a5063c42a> accessed 31 July 2020.

[113] Granger, 'States as Successful Litigants before the European Court Of Justice: Lessons from the "Repeat Players" of European Litigation' (n 52) 12.

[114] Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114.

law.[115] It should be noted that this was in 1965, three months into the Empty Chair Crisis and at a time when Germany wished to be seen as the Good European in contrast to Bad European France.

There are, of course, cases at the Court that catch the headlines elsewhere: an example from the UK is the press coverage of *Factortame*.[116] Geddes refers to *Factortame* having been greeted by a 'chorus of disapproval' in the press, and the case is still being cited in arguments about Brexit.[117] Other cases with constitutional significance may, however, be overlooked.

Just as 'the government' is not a monolithic entity, 'the public' consists of several constituencies, only some of which governments intend to appeal to directly—although for cases that have come to popular attention, those constituencies may include the news media. Even if a government does not canvass an affected sector in advance of making observations (as, for instance, the UK Intellectual Property Office does in IP cases), it is likely to consider its audience. It may also make a government position that failed known to those interested *after* the hearing, as the UK government did following the Court's decision in *Tele2 Sverige*. Following this case, which drew 15 submissions from member-state governments, the UK published a ten-point reaction to the Court's judgment on the data retention provisions of Sweden and the UK.[118]

The view that a government might wish to make known the position it took in its observations is somewhat contradicted by evidence of the UK's inconsistent approach to issuing such information. In *Briels*, both the UK's written and oral observations were put into the public domain, as were its written observation in *ATAA*; its written observations in *Gambazzi* were released as the result of a Freedom of Information Act request.[119] However, a request for the same information was rejected by the Information Commissioner's Office (ICO) in *Alimanovic* on the grounds that such documents were not created for proceedings before a *national* court and therefore did not fall under the provisions of the Act.[120] The ICO said:

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[115] Davies (n 8) 115 fn 135.

[116] Case C-221/89 *The Queen v Secretary of State for Transport, ex p Factortame* EU:C:1990:257.

[117] Suella Fernandes, 'Britain Needs Brexit so It Can Decide Its Own Fate without Asking Permission from European Judges' *The Telegraph* (London, 20 June 2016).

[118] Joined Cases C-203/15 and C-698/15 *Tele2 Sverige* EU:C:2016:970; HM Government, 'Data Retention and Investigatory Powers Bill: Government Note on the European Court of Justice Judgment' (2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/331106/DRIPgovernmentNoteECJjudgment.pdf> accessed 3 August 2020.

[119] Case C-521/12 *Briels* EU:C:2014:330; Case C-366/10 *Air Transport Association of America* EU:C:2011:864; Case C-394/07 *Gambazzi* EU:C:2009:219.

[120] Case C-67/14 *Alimanovic* EU:C:2015:597.

> The Commissioner is therefore satisfied that [the Freedom of Information Act] allows sufficient leeway for an authority to rely on the exemption in cases where the court in question … does not exercise the judicial power of the state and yet is an international court whose jurisdiction the UK has recognised that exercised the judicial power of the state.[121]

Similarly, Ireland refused an FOI request for all its observations made up to 2013.[122] There appears to be a tension between demonstrating to a particular community that the government is acting to its benefit (in general) and acceding to requests for specific information about a government's position from individuals. Notably, these call for responses from different levels of government.

Nevertheless, it can be argued that being seen to participate in the decision-making processes of an EU institution may in itself contribute to a perception that a Member State has influence both inside and outwith the EU. It is unfortunate that relatively little of such government activity is exposed to domestic audiences, via the news media or otherwise. This is not so much from the viewpoint of governments' status, but because it could be argued that, from the moment that *van Gend* was decided, Member States had a responsibility to make the public aware that EU law was a guarantor of individual rights that could be vindicated both domestically and, ultimately, at the Court of Justice.[123]

10. A government sees the benefit of strengthening the EU's dispute resolution system and the long-term health of the EU legal order

This final category of motivation—that governments seek to strengthen the EU's legal system—may be the hardest for which to find convincing evidence, despite being proposed several times. Mattli and Slaughter argued in their seminal 1993 paper that the first potential category of state preference was a preference for 'an effective dispute resolution system—a mechanism for enforcing voluntary agreements and bargains.'[124] The assumption that *non-state* users of the EU legal system are seeking an efficient cross-border dispute resolution mechanism is one of the

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[121] ICO Decision Notice (8 March 2016) <https://ico.org.uk/action-weve-taken/decision-notices/fs50587685/> accessed 3 August 2020.

[122] Elaine Fahey, 'On the Assessment of the Operation of EU Law in the Irish Courts since Accession (UACES Conference, 40 Years since the First Enlargement, London, 7-8 March 2013)' (2013) <https://www.uaces.org/archive/papers/abstract.php?paper_id=683> accessed 11 August 2020.

[123] Case 26/62 *Van Gend en Loos* EU:C:1963:1.

[124] Mattli and Slaughter (n 88) 184.

bases of the neofunctionalist model of the European Union. Equally, to the extent that governments tend to make submissions in support of national companies and industries in cases in which they are not parties, it should also be an aspiration of Member States.

There is no doubt that Member States have expressed, in various ways, a desire to see the legal system of the EU operating smoothly. The UK House of Lords has, for instance, produced two reports on the efficiency of the Court's procedures, in 2011 and 2013.[125] Kilbey points out that Member States—including the UK—have argued strongly in favour of strengthening the Court's enforcement mechanisms in infringement actions.[126] States are more likely to comply with the Court's findings if they have a reasonable expectation that other states will be held up to the mark by the Court if they fail to implement provisions of EU law or do not enforce them.

The argument may also be posed in terms of legitimacy. Just as Member States' participation in the Treaty revision procedure lends the Treaties legitimacy, their participation in Court proceedings also has a decisive role in the legitimacy and acceptance of the *acquis communautaire*, including Member States' willingness to implement or comply.

Finally, it can be argued that Member States have a broader constitutional stake in the success of the EU legal system. Dougan argues that 'the process of legislative experimentation and discovery [enhances] the long-term health of the Community legal order' and participation in the Court's proceedings is undoubtedly part of this process.[127]

Conclusion

While there are reasons for a member-state government to intervene that are concerned with high-level political concerns—its constitution and the national and international balances of power—responses to cases are not usually, or perhaps ever, instigated at a political level but at a functional level - within government ministries and by civil servants. This research did not uncover any examples of ministers initiating observations, contributing to them or even seeing them in advance. It is tempting to look upon government contributions in the most important

[125] House of Lords European Union Committee, 'European Union Committee - Fourteenth Report: The Workload of the Court of Justice of the European Union HL Paper 128' (n 16); House of Lords European Union Committee, 'Workload of the Court of Justice of the European Union: Follow-Up Report HL Paper 163' (n 16).

[126] Ian Kilbey, 'The Interpretation of Article 260 TFEU (Ex 228 EC)' (2010) 35 EL Rev 370.

[127] Michael Dougan, 'Vive La Différence: Exploring the Legal Framework for Reflexive Harmonization within the Single European Market' in Russell A Miller and Peer C Zumbansen (eds), *Annual of German and European Law 2003* (Berghahn 2004) 160.

cases as representing some form of constitutional impact statement, but while they may have this effect they rarely seem to have been conceived in those terms. Nevertheless, this classification of Member States' reasons for making submissions to the Court reflects responses to issues that have political, as well as legal, salience to governments. Both are significant. They are in practice hard to separate, and it could be argued that each category listed may involve legal and political considerations to greater or lesser degrees. Governments may also respond to cases for reasons of fiscal prudence, as in the *Imexpo* case highlighted in the previous chapter, or out of a desire to avoid making changes to legislation.[128]

It will be argued that any theory of the interaction between Member States and the Court must take all of these motivations into account. It must also acknowledge that governments' submissions are of value to the Court as well as the Member State.

It is not suggested that political scientists are unaware that preliminary references may be concerned with technical matters or that some government observations merely serve to clarify national legislation. Instead, it can be argued that these day-to-day exchanges of information may be played down in support of particular theories. Typically, the position being defended is one in which the Court is considered to have an integrative agenda against which the Member States have to defend themselves. Much statistical endeavour has been devoted to evaluating such empirical evidence as exists in an attempt to assess the credibility of Member States' 'threats'.[129] It can be argued that it is significant that, despite this mathematical effort, the argument rumbles on.

The next chapter will compare and contrast the motives of the 1973 Member States in submitting observations to the Court and will relate the findings to the classification laid out in this chapter.

[128] Case C-379/02 *Imexpo Trading* EU:C:2004:595.

[129] Bernadette A Kilroy, 'Integration through the Law: ECJ and Governments in the EU' (PhD Thesis, UCLA 1999); Clifford J Carrubba, Matthew Gabel and Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 American Political Science Review 435; Clifford J Carrubba, Matthew Gabel and Charles Hankla, 'Understanding the Role of the European Court of Justice in European Integration' (2012) 106 American Political Science Review 214; Olof Larsson and Daniel Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU' (2016) 70 International Organization 377.

Chapter 6: Denmark, Ireland & the UK

Introduction

This chapter will examine the relationship of Denmark, Ireland and the UK with the Court of Justice. It will demonstrate that the categories of motives laid out in the previous chapter are, to different degrees, relevant to each of these Member States.

The three states of the first, north-western, expansion of the European Community form a group mainly only in their length of membership, forty-one years as at the end of 2013. They constitute three of the four states[1] that Schimmelfennig and Winzen identify as most strongly demonstrating 'constitutional differentiation' in their acceptance of EU policies. In comparison with the original six member states, the 1973 states joined with more significant constitutional concerns—about sovereignty and aspects of national identity—and were able to secure differential treatment, in terms of treaty opt-outs.[2] One thing they do have in common is that none has a constitutional court, although Ireland's Supreme Court has the jurisdiction to conduct judicial review of legislation, as does Denmark's Højesteret at least in theory, if rarely in practice. Whether states without constitutional courts are more or less likely to submit observations, all other things being equal, has not been tested here. However, their constitutional structure means that if the compliance of a national measure with EU law is challenged before a lower court, that court will often have no recourse but to remit the question to the supranational level. Accordingly, there might be more national cases in which the government feels obliged to defend itself.

[1] The fourth being Sweden.

[2] Frank Schimmelfennig and Thomas Winzen, 'Instrumental and Constitutional Differentiation in the European Union' (2014) 52 JCMS 354.

Table 6[3]

	Denmark	Ireland	UK
Population (m) 2011	5.6	4.6	63.2
GDP at current prices ($bn) 2013	324	221	2490
GDP per capita ($thousand)	58	48	39
Type of government	Unitary bicameral constitutional monarchy	Unitary bicameral republic	Unitary(?) bicameral constitutional monarchy
Date state acquired its current extent	1814 (dissolution of union with Norway)	1922 (dissolution of union with UK)	1922 (dissolution of union with Ireland)
Voting weight in Council under Treaty of Nice	7	7	29
Open infringement proceedings as at 31 December 2013	30	38	53
References for a preliminary ruling from national courts 1973-2013	131	61	461
Observations submitted in national cases 1973-2013	79 (60%)	31 (51%)	406 (88%)
Observations submitted in non-national cases 1973-2013	275 (5%)	215 (4%)	887 (16%)
Opt-outs	3 (Economic and Monetary Union; Defence; Area of Freedom, Security and Justice)	2 (Schengen agreement; Area of Freedom, Security and Justice)	4 (Schengen agreement; Economic and Monetary Union; Area of Freedom, Security and Justice, Charter of Fundamental Rights)

[3] Population figures from Eurostat, 2011 Census <https://ec.europa.eu/CensusHub2/query.do?step=selectHyperCube&qhc=false> accessed 28 July 2020; GDP figures from International Monetary Fund World Economic Outlook Database October 2013 <http://www.imf.org/external/pubs/ft/weo/2013/02/weodata/weoselco.aspx?g=110&sg=All+countries+%2f+Advanced+economies> accessed 26 July 2020.

Nevertheless, the differences within the group are greater than their similarities, and thus they can usefully be compared and contrasted. Some differences are simply down to size: as far as their legislative power is concerned, Denmark and Ireland are of a similar small size, and under the Treaty of Nice they had equal voting weights (7 votes each) in the Council of the European Union.[4] By contrast, as Naurin and Lindahl point out, the UK's natural comparators are the other three large Member States: Germany and France, which are larger than the UK, and Italy which is slightly smaller; each had 29 votes.[5] Additional comparisons and contrasts lie in their constitutional traditions and histories. Denmark and the UK are constitutional monarchies and Ireland a republic; each embodies a distinctive version of constitutional democracy; Denmark is a civil-law jurisdiction and Ireland and the UK common-law jurisdictions. All three states demonstrate suspicion of some aspects of EU law and have both opt-outs from, and referendum locks on significant changes to, the Treaties. Denmark is regarded as a somewhat paradoxical 'good citizen'[6] while the UK remained the 'awkward partner'[7] to the end.

In the context of their application of EU law, Denmark and Ireland are both reasonably prompt and accurate transposers of EU law, with 30 and 38 infringement proceedings open respectively as at 31 December 2013. The UK was somewhat less so and had 53, the eighth highest number—although to put this figure in proportion, Italy (consistently the worst offender) had 104. By comparison, in the year to 31 December 2013, Denmark referred 6 cases for a preliminary ruling in 2013, Ireland 4 and the UK 14. Over the period studied here, the totals are Denmark 132, Ireland 61 and the UK 460.[8] Thus, as de la Mare and Donnelly express it, the three Member States display different 'reference potentials'.[9] As was noted in Chapter 3, Denmark participated in 6.4% of all preliminary reference cases between 1973 and 2013, Ireland in 4.5% and the UK in 24% (see Figure 16). To gain an idea of the proportion of cases in which, say, the UK submitted observations, it is necessary to sum the blue sector (of the three, only the UK submitted

[4] Council of the EU – Majority Voting <http://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/> accessed 26 July 2016.

[5] Daniel Naurin and Rutger Lindahl, 'Out in the Cold? Flexible Integration and the Political Status of Euro Opt-Outs' (2010) 11 European Union Politics 485.

[6] Rebecca Adler-Nissen, 'The Diplomacy of Opting-out: A Bourdieudian Approach to National Integration Strategies' (2008) 46 Journal of Common Market Studies 663; Rebecca Adler-Nissen, 'Justice and Home Affairs: Denmark as an Active Differential European' in Lee Miles and Anders Wivel (eds), *Denmark and the European Union* (Routledge 2014).

[7] Stephen George, *An Awkward Partner: Britain in the European Community* (3rd edn, OUP 1998).

[8] Excluding references that were subsequently withdrawn.

[9] Thomas de la Mare and Catherine Donnelly, 'Preliminary Rulings and EU Legal Integration: Evolution and Stasis' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 366.

observations), the turquoise sector (Ireland and the UK), the purple sector (Denmark and the UK) and the yellow sector (all three submitted observations).

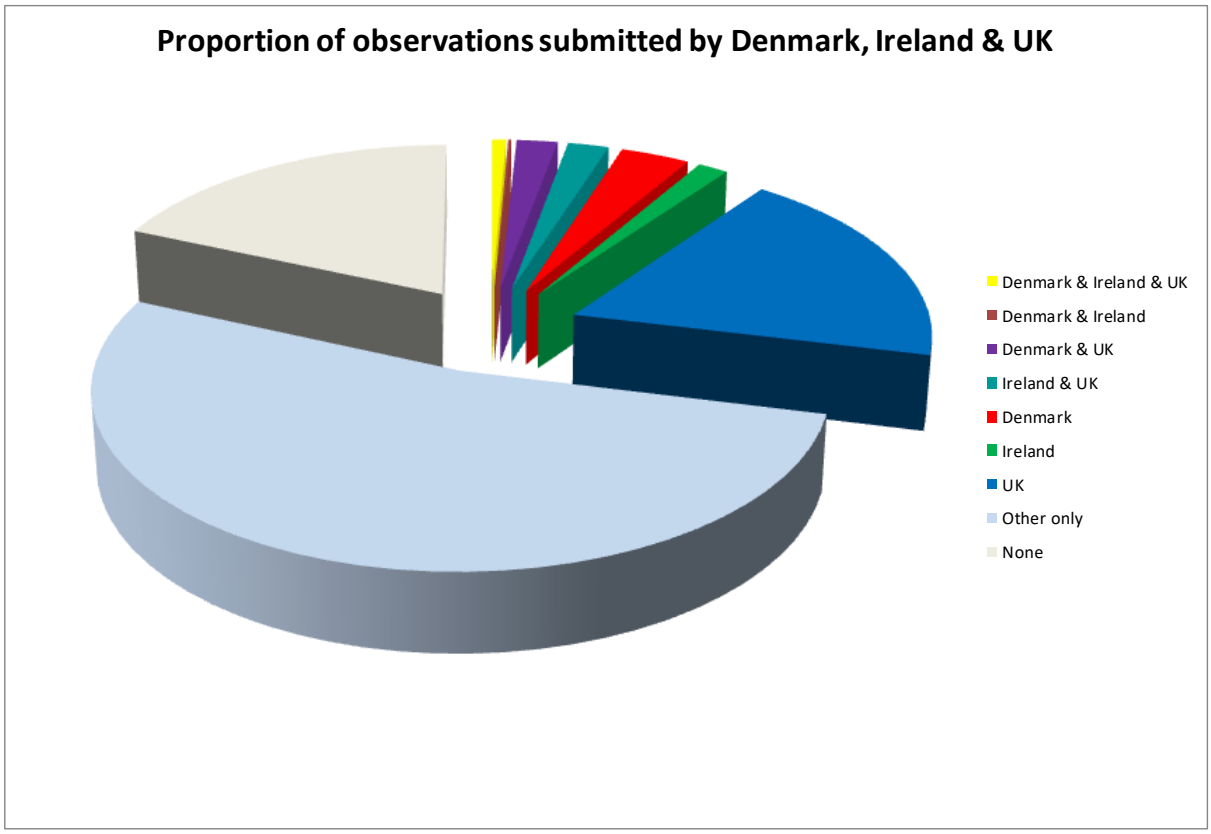

Figure 16: Proportion of observations submitted by Denmark, Ireland and UK

Denmark, Ireland and the UK share the distinction of having negotiated opt-outs from the Treaties: Ireland and the UK on the Schengen agreement,[10] Denmark and the UK on the Euro,[11] Denmark on defence,[12] the UK (with Poland) on the Charter of Fundamental Rights[13] and all three on the Area of Freedom, Security and Justice.[14]

[10] Protocol (No 19) On the Schengen Acquis Integrated Into the Framework of the European Union; Protocol (No 20) On the Application of Certain Aspects Of Article 26 of The Treaty on the Functioning of the European Union to the United Kingdom and to Ireland [2010] OJ C83/01.

[11] Protocol (No 16) On Certain Provisions Relating To Denmark; Protocol (No 15) On Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland [2010] OJ C83/01.

[12] Protocol (No 22) On the Position of Denmark [2010] OJ C83/01.

[13] Protocol (No 30) On the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom [2010] OJ C83/01.

[14] Protocol (No 22) On the Position of Denmark; Protocol (No 21) On the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice [2010] OJ C83/01.

For charts depicting the percentage of cases on selected topics in which Denmark, Ireland and the UK have submitted observations, see Appendix D.

Denmark

There are two main matters to explain when looking at Denmark's submissions to the Court of Justice. The first is the less complicated: why does Denmark make submissions in the cases that it does? The answer is most commonly that the government has an immediate, probably financial, interest in the outcome of a national case. Such a motive is common to all Member States and will be dealt with fairly briefly. Another particular feature is Denmark's higher political sensitivity to issues around immigration and national identity than many other Member States. This is connected to the second matter, which is more individual to Denmark and bears detailed examination: Denmark's broad reluctance to engage with EU law. This negative motivation, if so it can be called, will mainly be discussed under the heading of 'national constitutional interests'.

Denmark's activity at the Court of Justice

Denmark is considered to be conscientious in transposing and implementing EU law.[15] Figure 17, however, gives a vivid illustration of Denmark's relative inactivity vis-à-vis the Court of Justice. Denmark has sent relatively few cases to the Court—131 decided cases from 1973 to 2013—and made observations in 355 cases, 79 from its own courts and 276 from others. Its overall rate of submitting observations in its own cases, at 60%, is higher than Ireland's (48%) and much lower than the UK's (88%). It can be argued that the Danish government's close control over the referral of cases from Danish courts (of which more below) makes it possible for the government to seek to influence cases as much by preselection as by submitting observations.

As Table 6 indicates, 79% of the observations submitted by Denmark have been in cases from other states, although this represents only 6.5% of such cases. The percentage has slightly increased since the late 1990s to a figure of around 10% in recent years—slightly more than Ireland but less than half the rate of the UK. This nevertheless indicates that the Danish

[15] Gerda Falkner and Oliver Treib, 'Three Worlds of Compliance or Four? The EU-15 Compared to New Member States' (2008) 46 JCMS 293, 309; Tanja A Börzel and others, 'Obstinate and Inefficient: Why Member States Do Not Comply With European Law' (2010) 43 Comparative Political Studies 1363; European Commission, '31st Annual Report on Monitoring the Application of EU Law' (2014) 16.

government is becoming more engaged with EU law beyond its own cases, an intention confirmed in interviews carried out by Rytter and Wind in 2010.[16]

A Member State's reasons for limiting its involvement in EU law-making and dispute resolution may fall into two groups. The first result from the systemic factors identified in Chapter 3, being chiefly matters of resources. The second group of reasons are discussed in the previous chapter: constitutional concerns, a (lack of) desire to influence the development of particular areas of EU law or a government feeling that it will not gain political capital at the national level from being intervening.

It will be argued that Denmark's reasons for limiting its involvement with proceedings at the Court are little to do with size and resources but mainly to do with policy considerations, including its strong constitutional objections to a supranational legal system. These objections are also reflected in the Danish courts' apparent reluctance to make referrals. Meanwhile, the observations that Denmark does make are mainly concerned with technical issues of EU law, although there are exceptions. In particular, Denmark tends to step outside its self-set boundaries in cases on citizenship.

[16] Jens Elo Rytter and Marlene Wind, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms' (2011) 9 International Journal of Constitutional Law 470, 493.

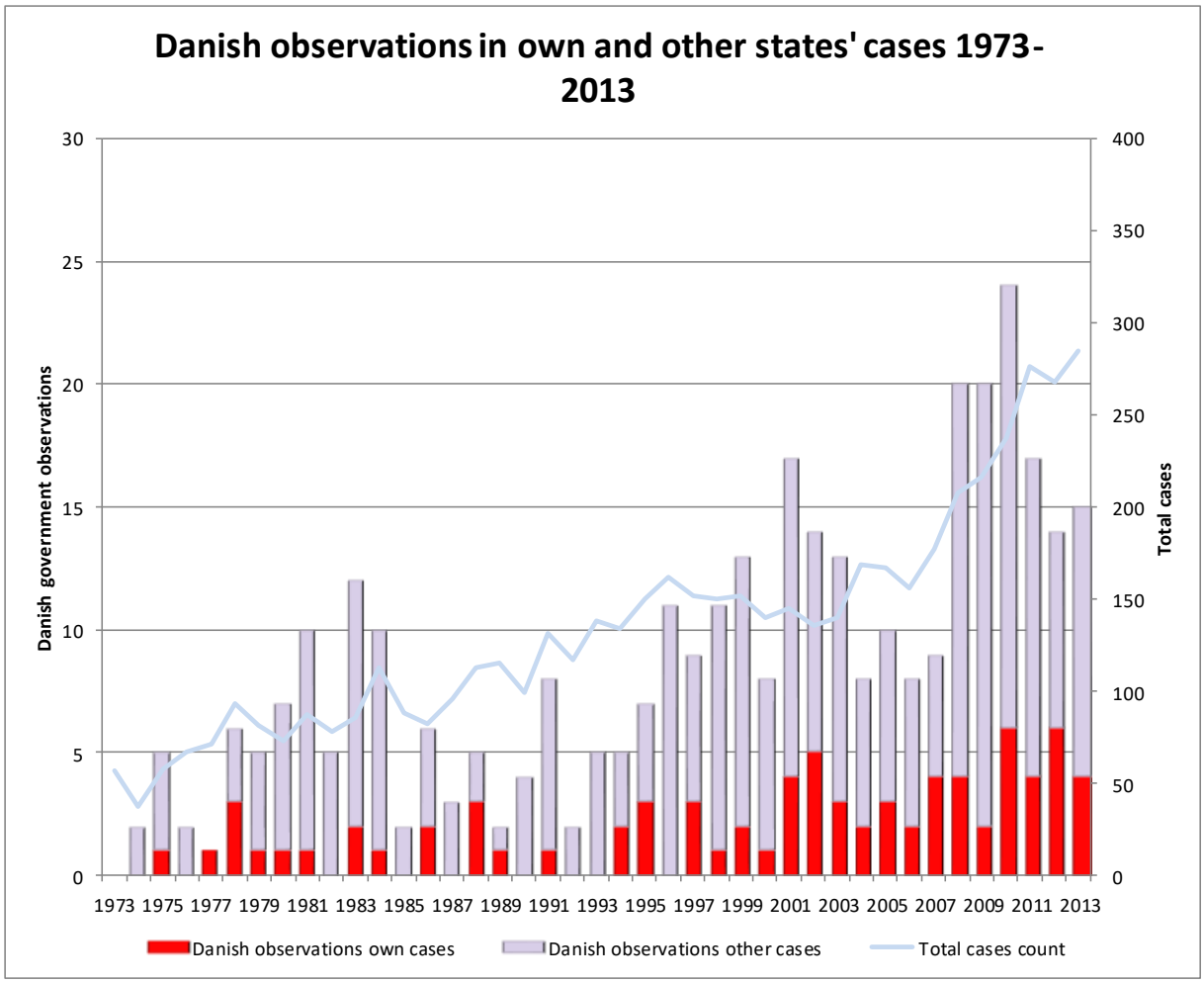

Figure 17: Danish observations in own and other states' cases

Subject areas

An analysis of the subject areas in which Denmark is more likely to intervene shows that Denmark has made observations more often than the average only in cases on EU citizenship - in around 33% of cases, as compared with about 13% for all Member States. It will be argued that this is unsurprising. The concept of citizenship of the EU raises issues that are of high salience to all Member States, not just because EU citizenship (now 'the fundamental status of nationals of Member States'[17]) depends on citizenship of a Member State—a jealously guarded privilege—but because, as Barnard points out, most of the rights afforded by EU citizenship are enforceable

[17] Case C-184/99 *Grzelczyk* EU:C:2001:458 para 1.

horizontally against an individual's own state.[18] However, Denmark can be argued to be especially sensitive to issues involving citizenship and sovereignty.

While Denmark has intervened less than average in cases on all the other subject areas, its next most frequent subject is free movement (15% as compared with 16% on average). The subject area in which it has made observations the least often is the Area of Freedom, Security and Justice (AFSJ), in which it has extensive opt-outs and has only intervened in 3% of cases as compared with an average from all states of 20%. Thus the areas in which Denmark is most and least likely to submit observations can be argued to be two sides of the same coin, both being concerned with Danish sovereignty.

Taxonomic analysis

Examples of the Danish government's submissions to the Court that might be attributed to the different headings that were described in Chapter 5 are set out in this section.

1. Immediate interest in the outcome of a national case

Denmark's submissions that most clearly fall into this category are those in which Denmark was the only (or almost the only) intervener apart from the Commission. Between 1973 and 2013 there were 23 cases referred by Danish courts in which Denmark submitted the only observations; 17 of these concerned tax (9) or tariffs (8) and can be seen to have had immediate financial implications. For example, *Imexpo* turned on the tariff to be applied to plastic chair mats, the importer arguing that a tariff of 2.2% applied and the Danish government arguing for a tariff of 10.7%.[19] Cases with immediate effects in the referring state are the easiest to identify, but at the opposite extreme, a case may entail consequences for all Member States and therefore attract many submissions. An example is *Vanbraekel*—one of a line of cases on Member States' responsibility to reimburse medical costs incurred in other states—with eleven submissions.[20] Denmark was one of ten countries that made no written submission but (presumably having identified an imminent threat) was represented at a reopened oral hearing. A similar case, but where one the outcomes feared by the Member States was legislative rather than fiscal, was *Metock*, where Denmark was one of the ten Member States that submitted observations but ultimately had to change national legislation.

[18] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edn, OUP 2016) 327.

[19] Case C-379/02 *Imexpo Trading* EU:C:2004:595.

[20] Case C-368/98 *Vanbraekel* EU:C:2001:400.

2. and 3. Preferred answer on a technical issue or a provision or principle of EU law

It is often difficult to identify cases in which a Member State has submitted observations in terms of their content of technical issues versus issues of principle, not least because the latter tend to arise, sometimes unexpectedly, out of the former. An example of a case in which Denmark appeared to have no immediate financial interest or exposed national legislation, and for which it was possible to read Denmark's observations, is *Wall*.[21] This German case both concerned technical matters to do with public procurement and raised the issue of whether transparency was a general principle of EU law. The Danish government's proposed answers were that the technical matters were a matter for the national awarding body and that the issue of transparency was outside the scope of EU law.[22]

Another such case was *Banca popolare di Cremona*, on whether a regional direct tax on turnover was compatible with EU VAT legislation.[23] Denmark was one of thirteen Member States to submit oral pleadings in a reopened hearing. At first sight, Denmark appears to have had no financial interest in the outcome. However, this case illustrates a not unusual phenomenon: Denmark had previously lost a case on a turnover tax, necessitating a change to its legislation, and as a result had particular expertise in the technicalities of the Sixth VAT Directive as regards such taxes.[24] It can be argued that Denmark's involvement in these cases demonstrates motives of both the expression of its preferences on technical issues, its concern with an important provision of EU law and its view on, arguably, a general principle of EU law.

4. Support for another Member State

Without insider knowledge, finding direct evidence of a Member State's having made observations primarily in support of another is unlikely. Some authors have, however, found statistical evidence that it occurs. Both Mattila, and Naurin and Lindahl, found evidence of Member States voting in each other's support at the Council.[25] Mattila found that Denmark was most likely to work together with Finland, the Netherlands and Sweden against the majority.

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[21] Case C-91/08 *Wall* EU:C:2010:182.

[22] From Report for the Hearing held by the University of Gothenburg.

[23] Case C-475/03 *Banca popolare di Cremona* EU:C:2006:629.

[24] Case C-200/90 *Dansk Denkavit* EU:C:1992:152.

[25] Mikko Mattila, 'Voting and Coalitions in the Council after the Enlargement' in Daniel Naurin and Helen Wallace (eds), *Unveiling the Council of the European Union - Games Governments Play in Brussels* (Palgrave Macmillan 2008) 33; Daniel Naurin and Rutger Lindahl, 'East-South-North: Coalition Building in the Council before and after Enlargement' in Daniel Naurin and Helen Wallace (eds), *Unveiling the Council of the European Union - Games Governments Play in Brussels* (Palgrave Macmillan 2008) 73.

Naurin and Lindahl similarly found Denmark most likely to cooperate with Sweden, the UK, the Netherlands, Finland and Ireland. This indicates a clear geographical pattern, perhaps underlain by similar economic interests. Analysis of the Member States in whose cases Denmark is most likely to submit observations shows the same pattern (Table 7). In view of their findings, it is possible to argue that it is at least likely that Denmark makes observations in support of, particularly, its neighbouring states to the north and west.

Table 7

Referring Member State	Danish observations (%)
Denmark	60.3
Sweden	12.2
UK	10.4
Netherlands	8.6
Finland	8.1
Czech R	7.7
Austria	6.1
Germany	4.5
Luxembourg	4.5
Belgium	4.1
Ireland	3.3
France	3.1
Italy	2.3
Hungary	1.9
Portugal	1.3
Spain	1.3

5. National constitutional interests

As noted in the introduction to this chapter, Denmark is a paradoxical good Member State. It tends to have an almost isolationist approach to international cooperation and has secured opt-outs on several matters of constitutional importance, but it transposes legislation reasonably

promptly and accurately and has accordingly had few direct actions against it. Meanwhile, it discourages its courts from referring questions of EU law to the Court of Justice and, while it shares many arguably constitutional concerns with the UK, it is much less likely to contribute to cases concerning them.

The most important feature of Denmark's relationship with EU law to consider is, therefore, its lack of involvement. This is first considered in general, and then some specific points are mentioned concerning the subheadings listed in the previous chapter: sovereignty, subsidiarity and competence; the national balance of power; and the balance of power between Denmark and the Court of Justice itself.

It can be argued that an explanation for Denmark's relative passivity at the Court of Justice may be found in its attitude to international legal regimes in general. Rytter and Wind's observations on Denmark's relationship with the European Court of Human Rights are relevant in this regard. They note that the assumption underlying Denmark's 1992 Act incorporating the European Convention on Human Rights (ECHR) was that the Act should not alter the constitutional status quo, in which the Danish judiciary was subordinate to the legislature.[26] As a result, Danish courts perceive their role to be confined to the implementation of Strasbourg case law rather than any interpretative obligation. Wind argues that the same principles are also applied to EU law.[27]

More generally, Wind argues that any kind of judicial review of national legislation is seen as incompatible with Denmark's particular model of democracy, in which the courts are regarded as subordinate to the elected parliament. The principle of the equal separation of powers that is considered to apply elsewhere, however imperfectly it may be realised in practice, is not fundamental to what Wind calls Nordic majoritarian democracy; on the contrary, it is regarded as unacceptable that non-elected 'quasi-guardians'[28]—the judiciary—should have the power to impose limits on the actions of a parliament elected by popular mandate, and courts are expected to exercise judicial self-restraint. The Danish constitution of 1849 did not provide for judicial review of legislative acts by Danish courts, and although the Supreme Court developed such a concept, it was exercised under extreme self-restraint.

[26] Rytter and Wind (n 16) 480.

[27] Marlene Wind, 'The Nordics, the EU and the Reluctance Towards Supranatural Judicial Review' (2010) 48 Journal of Common Market Studies 1039.

[28] Robert A Dahl, *Democracy and Its Critics* (Yale University Press 1991) 155.

Rytter and Wind observe that it was not until the 1990s, twenty years after Denmark's accession to the European Community and forty years after its accession to the European Convention on Human Rights, that criticism of Danish judicial self-restraint became widespread. A Danish Governmental Report on the Judiciary from 1996 stated:

> This development [the growing importance of European law] contributes, moreover, to a change in the role of the courts – a role by which the courts, to a larger extent than previously, are called upon to exercise an autonomous, law-making function. Consequently, it is to be expected that the judges must adopt a broader style of interpretation and a sources-of-law approach, which to a certain extent goes beyond and thereby in part differs from the current one.[29]

Thus the Danish government was urging the courts to consider an interpretative obligation to which they had arguably been subject for twenty-three years.

The interpretative obligation, however, represents only the minimum level of engagement with developments in European law. Denmark's relatively small number of references to the Court of Justice has already been noted, and it can be argued that requesting a preliminary ruling is equivalent to inviting *supranational* judicial review. But Danish aversion to the practice of judicial review is not the only reason for the low level of referral. The Danish government's attorney advised judges that, before a case could be referred to the Court of Justice, the national court must seek the advice (and, impliedly, the permission) of the parliamentary European Affairs Committee (EAC)[30]—and such permission is more often refused than not.[31] The role of the EAC is discussed further below.

Wind draws attention to a reluctance on the part of the public to take action against the state (which is your friend, not your enemy), also noting that it is not natural in Denmark to regard a

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[29] Jens Elo Rytter, 'Constitutional Interpretation – Between Legalism and Law-Making' (2007) 52 Scandinavian Studies in Law 255, citing *Domstolsudvalgets betænkning* (*Proposal of the Courts' Committee*) (Governmental Report No 1319, 1996) 176.

[30] Peter Biering, 'The Application of EU Law in Denmark: 1986 to 2000' (2000) 37 Common Market Law Review 925, 936.

[31] Rytter and Wind (n 16) 489, citing Peter Pagh, 'Juridisk Special Udvalg Og Præjudicielle Forelæggelser for EF-Domstolen (The Judicial Committee and Preliminary References to the European Court of Justice)' in B Olsen and K Engsig Sørensen (eds), *Europæiseringen af Dansk Ret (Europeanisation of Danish Law)* (Djøf Forlag 2008) 480.

court as the appropriate venue for conflict resolution. This could be argued to limit the flow of cases that might otherwise have given rise to preliminary references.[32]

Denmark's attitude to the Court appears to mirror the Danish perception of EU membership in general. Denmark's government has been argued to perceive the Council as the only legitimate arena for its influence and, Rasmussen asserts, to regard Danish MEPs as having shifted their loyalty from Denmark to the EU upon assuming their seats in the Parliament.[33] Rasmussen notes that until the mid-1980s, Denmark regarded European Affairs as falling under foreign, rather than domestic, policy.[34] Thorsten Borring Olesen observes that, although EU rules have 'deeply affected' the organisation of the Danish state, political and media perceptions overlook this. He describes Denmark as 'a pioneer in devising mechanisms ... with the ultimate aim of retaining democratic-parliamentary control over EU policy and safeguarding national sovereignty over key policy areas'. The prime examples of these mechanisms are the opt-outs, conceded by the Council in response to the 'Denmark in Europe' memorandum that was issued by the Danish government in 1990 after considerable parliamentary debate.[35] In addition to the opt-outs on, for instance, defence matters[36] and the AFSJ,[37] the mechanisms include the control over the implementation of EU law at both the national and supranational levels by parliamentary committees[38] and Denmark's resistance in the Council to changes in the institutional structure that might alter the balance between small and large Member States.[39]

On the face of it, it does not seem unreasonable to assume that Denmark's influence over EU law and policy is not just lessened by its small size, but by its opt-outs and its lower participation in

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[32] Marlene Wind, 'The European "Rights Revolution" and the (Non) Implementation of the Citizenship Directive in Denmark' in Lee Miles and Anders Wivel (eds), *Denmark and the European Union* (Routledge 2014) 171.

[33] Anne Rasmussen, 'Denmark and the European Parliament' in Lee Miles and Anders Wivel (eds), *Denmark and the European Union* (Routledge 2014) 131.

[34] Rasmussen (n 33) 130.

[35] Denmark and the Treaty on European Union [1992] OJ C348/1; the memorandum is reproduced in English in Finn Laursen and Sophie Vanhoonacker, *The Intergovernmental Conference on Political Union: Institutional Reforms, New Policies and International Identity of the European Community* (European Institute of Public Administration 1992) and discussed in Anna Michalski, 'A Reluctant Partner: The Pattern of Denmark's Involvement in the European Community' (PhD Thesis, LSE 1995).

[36] Under Protocol 5 to the Treaty of Amsterdam.

[37] Under Protocol 22 to the Treaty of Lisbon.

[38] Thorsten Borring Olesen, 'Denmark and the 1973 Enlargement: The Dual Impact' (UACES Forty Years since the First Enlargement Conference, London 12 April 2013).

[39] Rasmus Brun Pedersen, 'Denmark and the Council of Ministers' in Lee Miles and Anders Wivel (eds), *Denmark and the European Union* (Routledge 2014) 107.

Council voting.[40] Denmark might, therefore, seek to redress the balance by more activity in the judicial sphere. However, the assumption that those states exercising opt-outs are 'out in the cold' at the Council has been challenged. Research by Naurin and Lindahl indicates that, while states with opt-outs may lack direct influence over those particular areas, they do not lose political clout in general.[41] On the other hand, Warleigh regards 'flexible integration' as, in fact, the antithesis of integration[42] and Adler-Nissen points to diplomatic measures undertaken by the UK and Denmark (which she describes as 'the two opt-out champions') to reduce their marginalisation.[43]

The Danish government's *ex-ante* control over preliminary references is unusual, but the limited extent to which it avails itself of the procedure for making observations is further evidence of its reluctance to participate in legal integration. Rytter and Wind express surprise that Denmark has not taken more advantage of the opportunity to submit observations,[44] given that the Court is an arena where a small country may seek to influence the course of EU legal evolution on an equal footing with more prominent countries. This is all the more important when that small country has voluntarily excluded itself from certain policy areas at the Council level.[45]

As far as the Court is concerned, it can be argued that Denmark has expended more energy on bolstering its perception that it has successfully evaded EU supremacy, than on taking advantage of the opportunity to influence the direction of EU legal evolution. Denmark's somewhat contradictory, passive-resistant approach to EU law illustrates two ways in which a government

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[40] Simon Hix and Sara Hagemann, 'Does the UK Win or Lose in the Council of Ministers?' (*The UK in a Changing Europe*, 2016) <http://ukandeu.ac.uk/explainers/does-the-uk-win-or-lose-in-the-council-of-ministers/> accessed 19 July 2020.

[41] Daniel Naurin and Rutger Lindahl, 'Out in the Cold? Flexible Integration and the Political Status of Euro Opt-Outs' (2010) 11 European Union Politics 485, 504.

[42] Alex Warleigh, 'Towards Network Democracy? The Potential of Flexible Integration' in Mary Farrel, Stefano Fella and Michael Newman (eds), *European Integration in the 21st Century. Unity in Diversity?* (Sage 2002) 108.

[43] Adler-Nissen, 'The Diplomacy of Opting-out: A Bourdieudian Approach to National Integration Strategies' (n 6).

[44] Rytter and Wind (n 16) 497.

[45] Although there is debate about whether Denmark's influence in the Council is reduced by its opt-outs or whether, paradoxically, its influence is increased because its reservations force its officials to compensate by being more active and better prepared: Rebecca Adler-Nissen, 'Behind the Scenes of Differentiated Integration: Circumventing National Opt-Outs in Justice and Home Affairs' (2009) 16 Journal of European Public Policy 62, 76; Jonathan P Aus, 'The Mechanisms of Consensus: Community Asylum Policy' in Daniel Naurin and Helen Wallace (eds), *Unveiling the Council of the European Union - Games Governments Play in Brussels* (Palgrave Macmillian 2008) 100–113; cf Daniel Naurin and Rutger Lindahl, 'East-South-North: Coalition Building in the Council before and after Enlargement' in Daniel Naurin and Helen Wallace (eds), *Unveiling the Council of the European Union - Games Governments Play in Brussels* (Palgrave Macmillan 2008) Figs 4.2 and 4.3.

can constrain the process of European integration. It can attempt to influence the direction of legal evolution by direct intervention in preliminary reference cases before the Court—an opportunity of which Denmark is not yet taking full advantage—or it may attempt to discourage the bringing of such cases by its national courts. The Danish government's policy has been to influence the process of legal integration by controlling the flow of cases that proceed to supranational dispute resolution rather than by seeking to influence the outcome of cases that come before the Court (see Figure 17).

Sovereignty, subsidiarity and competence

It is clear that Denmark, while broadly compliant in implementing EU legislation, is uncomfortable with the idea of submitting to the jurisdiction of a supranational body. It is curious, therefore, that its contributions have been patchy in cases that might have afforded an opportunity to curb the scope of the supremacy of EU law. Denmark was among the majority who failed to submit observations in the important (if possibly unanticipated in their constitutional results) *Simmenthal*, [46] *Macarthys v Smith*,[47] *Solange II*,[48] *Marleasing*,[49] *Foster v British Gas*[50] and *Factortame I*. However, they joined the majority in making observations in *Factortame II* and *III*.[51] The latter suggests a reactive, rather than a proactive, response to cases that raise issues that might affect the constitutional balance.

The Court's case law on subsidiarity consists mainly of direct actions. Those preliminary references that turned on subsidiarity—notably *Alliance for Natural Health*, *BAT* and *Vodafone*—received no observations at all from the Danish government.[52] This is curious because the European Affairs Committee of the Danish parliament has, since the Lisbon Treaty, become involved in scrutinising whether the subsidiarity principle is being observed in the creation of EU legislation at an interparliamentary level, most notably in orchestrating the rebellion against the

[46] Case 106/77 *Simmenthal* EU:C:1978:49

[47] Case 129/79 *Macarthys v Smith* EU:C:1980:103.

[48] Case 345/82 *Wünsche* EU:C:1984:166.

[49] Case C-106/89 *Marleasing* EU:C:1990:395.

[50] Case C-188/89 *Foster v British Gas* EU:C:1990:313.

[51] Case C-213/89 *R v Secretary of State for Transport, ex p Factortame* EU:C:1990:257; Case C-221/89 *R v Secretary of State for Transport, ex p Factortame* EU:C:1991:320; joined cases C-46/93 and C-48/93 *Brasserie du pêcheur v Deutschland and R v Secretary of State for Transport, ex p Factortame* EU:C:1996:79.

[52] Case C-58/08 *Vodafone* EU:C:2010:321; Case C-491/01 *British American Tobacco* EU:C:2002:741; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health* EU:C:2005:449.

Monti II regulations on the right to strike which led to the first yellow card being issued under the Early Warning Mechanism in 2012.[53]

Denmark's participation in cases on competence has mainly been confined to *Metock*, in which case its primary objective was to defend its immigration policy.[54] Public opinion in Denmark (led by almost all its political parties) was subsequently focused on what was seen as political activism by the Court rather than on the competence issues raised.[55] Notably, Denmark did not make any observations in *Pringle*, nor in important early cases in which competence was an issue such as *Defrenne*.[56]

It is being argued in this chapter that the entire concept of the preliminary reference procedure is antithetical to Danish notions of constitutional propriety. Denmark's failure to participate in cases that raise questions on constitutional issues can also be ascribed to a related phenomenon: the low political priority that successive Danish governments have ascribed to EU issues. Only in the aftermath of the *Metock* ruling—and an upsurge in public Euroscepticism—did a Danish government announce that it would give high priority to Denmark's position in the EU, and that stance was short-lived.[57]

The national balance of power

As noted above, Rytter and Wind identified two principles that characterise Denmark's form of majoritarian democracy. First, it is for the legislature, and not the judiciary, to ensure that Danish legislation complies with international legal obligations—indeed, that the courts may apply a rebuttable presumption to the effect that Danish legislation complies with both the ECHR and EU law. Second, the courts should refrain from the autonomous interpretation of the Convention and Treaties. Several consequences flow from this that affect the balance of power between Denmark's institutions. Firstly, and by contrast with other Member States, the preliminary reference procedure neither empowers the lower courts relative to the Supreme Court (Højesteret) nor allows national courts to submit preliminary references entirely of their own initiative, at least

[53] Ian Cooper, 'A Yellow Card for the Striker: National Parliaments and the Defeat of EU Legislation on the Right to Strike' (2015) 22 Journal of European Public Policy 1406.

[54] Case C-127/08 *Metock* EU:C:2008:449.

[55] Wind, 'The European "Rights Revolution" and the (Non) Implementation of the Citizenship Directive in Denmark' (n 32).

[56] Case C-370/12 *Pringle* EU:C:2012:756; Case 43/75 *Defrenne v SABENA* EU:C:1976:56.

[57] Morten Kelstrup, 'Denmark's Relation to the European Union: A History of Dualism and Pragmatism' in Lee Miles and Anders Wivel (eds), *Denmark and the European Union* (Routledge 2014) 22.

in principle. Secondly, the actions of the executive in respect of EU law are carried out under close supervision by the legislature in the form of the parliamentary European Affairs Committee.

European Affairs Committee

The influence over both references and observations of Denmark's parliamentary European Affairs Committee has been noted above. Historically, though, the Committee did not initially appear to have conceived of the Court as being an arena in which Denmark should become involved unless it was fighting an infringement case. The EAC's first statement on the Court of Justice—after the *Metock*[58] case made it clear that Danish immigration law did not comply with the citizens' rights directive[59]—was not issued until 2009. It consisted of a belated declaration that there was a need for the Committee to be advised of cases coming before the Court that could conflict with national law. Given that Denmark joined in 1973—when the implications of direct effect and supremacy were already clear to legal scholars—it is astonishing that the power of the Court of Justice was barely being acknowledged nearly four decades later. Rytter and Wind offer the explanation that such power attributed to a supranational body represents a 'highly disturbing—and even illegitimate—element in the European political process' with which Denmark does not wish to engage.[60]

Nedergaard describes the EAC as 'a concrete expression of the desire by the parliament to control the EU decision-making process that is predominantly handled by the executive': the executive carries out the procedure under what amounts to a parliamentary veto.[61] The process is nevertheless cooperative: EU cases are generally referred by a ministry to the EAC, the minister giving an oral presentation of the government's proposed action. The case is then submitted to the relevant Special Committee(s), generally the Environmental, Agricultural and in particular the Special Judicial Committee,[62] which issues its own opinion on the case. The committees report back to the EAC and, in potential preliminary reference cases, via the State Attorney to the court which raised the question of EU law.

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[58] Case C-127/08 *Metock* EU:C:2008:449.

[59] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[60] Rytter and Wind (n 16) 497.

[61] Peter Nedergaard, 'EU Coordination Processes in Denmark: Change in Order to Preserve' in Lee Miles and Anders Wivel (eds), *Denmark and the European Union* (Routledge 2014) 212.

[62] The *Juridisk Specialudvalg*

The Judicial Committee's opinion is non-binding, but in practice, it is very influential. Pagh demonstrates that there is an unusually close relationship between the Danish courts and the Ministry of Justice, mainly as a result of a historical tendency to recruit judges from that ministry.[63] Pagh and Wind both found that the courts received active discouragement from the EAC via the State Attorney to refer cases, Wind, in particular, finding that 69% of the Danish judges she questioned had chosen not to make a reference on the advice of the State Attorney. [64] Wind notes a tendency for the Judicial Committee to ensure that, where a Danish court does refer a case, questions are framed in purely technical terms, leaving as little opportunity as possible for a dynamic interpretation.[65] She does, however, observe that, where a case is between two private parties, the Committee is less likely to be involved and, when it is, it is less likely to object to a preliminary reference being made.[66] Nevertheless, a potential conflict of interest arises when the organ of state responsible for implementing EU law is also tasked with permitting the courts to refer questions of interpretation. In addition, if applied to the Supreme Court, such discouragement could be in breach of the wording of Article 267 TFEU.[67]

As far as government observations are specifically concerned, a comment that Rytter and Wind recorded in 2010 points both to the EAC's attitude that the Court is a less important institution and to a sense that some suppression of interaction with the Court was felt by the executive as well as the judiciary. A legal official in the Ministry of Foreign Affairs told them:

> There is no doubt that we have become much more active in trying to influence the development in the past three to four years … It is not something we are flagging in the Danish European Committee in Parliament, but even the politicians there have

[63] Peter Pagh, 'Denmark's Compliance with European Community Environmental Law' (1999) 11 Journal of Environmental Law 301; Peter Pagh, 'Præjudicielle Forelæggelser Og Juridisk Specialudvalg' (2004) 41 Ugeskrift for Retsvæsen 305, cited in Marlene Wind, 'The Scandinavians: The Foot-Dragging Supporters of European Law?' in Mattias Derlén and Johan Lindholm (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives* (Hart 2018).

[64] Marlene Wind, 'When Parliament Comes First – The Danish Concept of Democracy Meets the European Union' (2009) 27 Nordisk Tidsskrift for Menneskerettigheter 272, 283.

[65] See also Biering (n 30) for a detailed analysis of Danish references from 1986 to 2000.

[66] Rytter and Wind (n 16) 492.

[67] 'Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *shall* bring the matter before the Court' (emphasis added). Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117 also raises the possibility of a challenge to this procedure under Article 19(1) TEU.

> started to be a bit more interested in the Court—in particular, of course, in those cases where Denmark is a party.[68]

This comment points to another paradox: the EAC both exerts control over the government's interventions, and considers that the Court is not a primary, or arguably even legitimate, locus of activity for Denmark. The latter view is supported by the fact that the Court is only mentioned once in the EAC's own account of its activities.[69]

Balance of power between Denmark and the Court of Justice

It was noted above that such power of judicial review as exists in Denmark does not stem from the Danish constitution of 1849 but was developed by the Supreme Court, which has exercised this power under a particularly strong form of self-restraint. Indeed, the Supreme Court has only once ruled in favour of setting aside an Act of the Danish parliament as unconstitutional, in 1999.[70] At the same time, in the *Maastricht Ratification Case*,[71] the Supreme Court reserved for itself the power to review the compatibility of EU acts with the Danish constitution.[72] This attitude renders the Court's power to 'interpret … EU treaties as if they represent a de facto constitution for Europe and exercise … judicial review over laws and practices within member states' especially problematic for Denmark.[73] Pagh observes:

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[68] Rytter and Wind (n 16) 494.

[69] Folketing's EU Information centre, 'The Folketing's European Affairs Committee' <https://english.eu.dk/en/denmark_eu/european_affairs_committee> retrieved 17 August 2019.

[70] The *Tvind* case (UfR 1999:841 H) in which the Supreme Court ruled that Parliament had acted unconstitutionally by using a special Act, rather than administrative procedures, to cut off funding to certain controversial private schools; see e.g. Eric Werlauff, *Civil Procedure in Denmark* (Kluwer Law 2009).

[71] *Hanne Norup Carlsen v Prime Minister Poul Nyrup Rasmussen* (UfR 1998:800).

[72] Takis Tridimas, 'Knocking on heaven's door: Fragmentation, efficiency and defiance in the preliminary reference procedure' (2003) 40 CMLR 9.

[73] Geoffrey Garrett, Daniel Kelemen and Heiner Schulz, 'The European Court of Justice, National Governments, and Legal Integration in the European Union' (2003) 52 International Organization, 149.

> A preliminary reference to the European Court will [therefore] resemble a questioning of the state's interpretation of EU law. Despite the fact that preliminary rulings are not formally a review of the limits of administrative power according to the constitution … the private party to a case will in such a situation experience it as very similar.[74]

Thus the making of references by Danish courts may be regarded as a form of voluntary submission to supranational judicial review and to constitute a form of constitutional impropriety. It seems likely that the Danish government's reluctance to engage in what it regards as unnecessary participation in other states' preliminary references would be seen in the same light: as voluntary or enforced refraining from constitutionally inappropriate acts.

Conclusion

Most of the constitutional issues that are specific to Denmark can be regarded as negatives in the balancing exercise that is undertaken by a Member State that is considering intervening in proceedings at the Court of Justice. The constitutional reasons not to intervene may be outweighed by more persuasive reasons to intervene in a given case, but it can be argued that the assumption seems to be more strongly against intervening, all other things (resources) being equal, than in comparable Member States.

6. Economic and political/policy preferences

The balancing exercise that is carried out in deciding whether to intervene in a preliminary reference is a microcosm of Denmark's dilemma about the EU as a whole. Kelstrup argues that Denmark's European policy has always been to maximise the benefits of economic integration, in particular as regards market access for its agricultural products, while minimising political integration.[75] This has, however, not led to significant participation in cases on agriculture (4% of the total during its membership) or Single Market issues such as the free movement of goods (6%), freedom of services and establishment (8%) or free movement of capital (7%). As noted in the introduction to this chapter, it is only in cases on freedom of movement of workers that Denmark is a relatively assiduous intervener, submitting observations in 15% of all cases brought. Granger also notes that Denmark does not appear to prioritise the defence of its

[74] Rytter and Wind (n 16) citing Pagh, 'Juridisk Special Udvalg Og Præjudicielle Forelæggelser for EF-Domstolen (The Judicial Committee and Preliminary References to the European Court of Justice)'.
[75] Kelstrup (n 57) 15.

economic interests.[76] Thus it can be argued that the *economic* salience of an issue for Denmark does not equate to the likelihood of its government intervening in cases that do not affect it closely.

The effect of the *political* salience of an issue on Denmark's participation in a case might be argued to depend on that issue's importance to the public. Cases of more abstract constitutional importance, say on subsidiarity, rarely collect observations from the Danish government. Those that are discussed in the public domain, by political parties and in the news media, are more likely to do so. Wind details the febrile atmosphere in Denmark concerning family unification versus immigration control in the period before and after *Metock*.[77] Extensive political and media discussion culminated in a national newspaper launching a three-week campaign criticising the government for withholding information about the changes from the public, while almost all political factions in the Danish government supported the previous, more restrictive, Danish citizenship and immigration rules.[78] It is unsurprising, in this context, that the Danish government chose to submit observations in *Metock*. Denmark has intervened in a third of all cases on European citizenship, making it by far the most frequent topic for submissions. It shares this preoccupation with Ireland and the UK, although there were only three cases in which all three submitted observations (*Ibrahim*, *McCarthy* and *Dereci*).[79]

A contrast may be made with a topic that is perceived to be of particular importance in Nordic countries: that of the environment. Surveys of the Danish public reveal that Danish voters considered the environment the fourth most important policy issue (measured over the period from 1975 to 2002) after employment, economics and social problems.[80] Despite this, Denmark's rate of making observations in environmental cases is about 7% lower than average.

A topic on which the Danish government has a clear policy of intervention is public access to documents (see section 8 below). It can be argued that the difference is that promoting the

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[76] Marie-Pierre Granger, 'The Influence of Member States' Governments on Community Case Law: A Structurationist Perspective on the Influence of EU Governments in and on the Decision-Making Process of the European Court of Justice' (PhD Thesis, University of Exeter 2001) 425.

[77] Case C-127/08 *Metock* EU:C:2008:449.

[78] Wind, 'The European "Rights Revolution" and the (Non) Implementation of the Citizenship Directive in Denmark' (n 32).

[79] Case C-310/08 *Ibrahim* EU:C:2010:80; Case C-434/09 *McCarthy* EU:C:2011:277; Case C-256/11 *Dereci* EU:C:2011:734.

[80] E.g. Sara B Hobolt and Robert Klemmensen, 'Responsive Government? Public Opinion and Government Policy Preferences in Great Britain and Denmark' (2005) 53 Political Studies Table 1.

environment may have significant economic consequences, even for a third-party Member State. In contrast, most access cases do not, freeing Denmark to make arguments in favour of access without financial risk.

7. Clarifying EU law

Superficially, all observations are made to clarify the interpretation of EU law and to put forward a preferred solution to the question posed to the Court. In a given case, it may not be clear whether a judgment clarifies the law or whether it allows or encourages it to evolve. Thus there is considerable overlap with the next heading.

A line of cases which demonstrates Danish interest in clarifying a topic is on sports and free movement. It started with *Bosman*, in which the Danish government specifically noted that clarification was required as to whether the football transfer rules led to discrimination under EU law.[81] Denmark also submitted observations in the related cases of *Deliège* and *Lehtonen*.[82] None appear to have had an immediate domestic application.

It is, however, challenging to distinguish a Member State's wish to clarify EU law *per se* from its having an apprehension that an interpretation might be contrary to its interests. A rare example is a line of nine cases on pregnant workers discussed by Cichowski.[83] Denmark only submitted observations in *Larsson*, one of the three Danish cases and only then at the oral stage of the proceedings.[84] However, Denmark's observations were in support of Ms Larsson and not what was then the legislative position in Denmark, which at least counters the proposition that it was motivated by self-interest.

Hagel-Sørensen and Rasmussen observe that among Denmark's stated reasons for participation is to put observations that 'are expected to contain points of view which are not submitted by anybody else'.[85] This may suggest a slightly oppositional attitude to Court proceedings but also a desire to add a specifically Danish perspective to debates about interpretation and legal evolution.

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[81] Case C-415/93 *Bosman* EU:C:1995:463.

[82] Joined cases C-51/96 and C-191/97 *Deliège* EU:C:2000:199; Case C-176/96 *Lehtonen* EU:C:2000:201;

[83] Rachel A Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (CUP 2007) 115.

[84] Case C-400/95 *Handels- og Kontorfunktionærernes Forbund i Danmark* EU:C:1997:259.

[85] Karsten Hagel-Sørensen and Hjalte Rasmussen, 'The Danish Administration and Its Interaction with the Community Administration' (1985) 22 Common Market Law Review 273.

It also offers one explanation for the frequency with which Denmark submits only oral observations.

8. Guiding the evolution of EU law

In her interviews with member-state governments' legal agents, Granger was told by representatives of Denmark, France, Portugal and the UK that those governments made observations in order 'to promote a particular vision of EU law'.[86] She argues that these governments have shown themselves willing to favour the exertion of a long-term influence on legal developments over 'the occasional defence of domestic interests', where these conflict.[87] In evidence, she cites Denmark's support of the litigants in the *Carvel* and *Hautala* cases on access to documents.[88] Granger regards Denmark as a 'repeat player' with a more proactive than reactive approach to the case law of the Court; this contrasts with the impression given in the 'constitutional' cases cited above, in particular the *Factortame* series of cases, that Denmark intervenes reactively.[89] The difference may lie in the quality of Denmark's analysis of upcoming cases, in that the latter cases are ones in which issues of constitutional significance were not easily anticipated from the order for reference. Wind, on the other hand, regards Denmark as primarily a reactive player.[90]

In general, Denmark's efforts to promote its vision of EU law do not centre on the Court of Justice but the Council, despite the opportunity that the Court affords for Denmark to influence the course of EU law on an equal footing with the other Member States and in policy areas from which it has opted out.

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[86] Marie-Pierre Granger, 'When Governments Go to Luxembourg... the Influence of Governments on the Court of Justice' (2004) 29 European Law Review 1, 8.

[87] Granger, 'When Governments Go to Luxembourg... the Influence of Governments on the Court of Justice' (n 86) 8.

[88] Case T-194/94 *Carvel and Guardian Newspapers v Council* EU:T:1995:183; Case C-353/99 P *Council v Hautala* EU:C:2001:661.

[89] Marie-Pierre Granger, 'States as Successful Litigants before the European Court Of Justice: Lessons from the "Repeat Players" of European Litigation' (2006) 2 Croatian Yearbook of European Law and Policy 27, 39.

[90] Wind, 'The European "Rights Revolution" and the (Non) Implementation of the Citizenship Directive in Denmark' (n 32) 171.

9. Political benefits from participation

Rytter and Wind argue that Danish politicians have not seen the Court as 'a site for influence or policy-making'.[91] However, this is contradicted by evidence that Denmark's status as a repeat player on specific topics is maintained, to some degree, to support its *international* political reputation. Denmark's longstanding policy on transparency and in particular, its interventions in cases on public access to documents, can be considered under this heading. Rossi and Vinagre e Silva observe that litigants have come to expect support from Denmark via observations in access cases; Denmark has never supported an institution against the applicant in such a case.[92] They do, however, consider whether repeated submissions of the same argument may bolster the Nordic countries' liberal reputations at the expense of the effectiveness of their governments' observations—although they tentatively reject the hypothesis.

It is more difficult to find examples of the Danish government making observations *directly* in order to play to a domestic audience, which can be presumed not to be familiar with the procedure of the Court and therefore not to be aware of the detail of efforts made on its behalf.[93] Certainly, Denmark's observations in *Metock* will have been made with the domestic audience (and in that instance the far-right Danish People's Party, upon which the government relied for its majority) in mind. However, any reputational effect can be argued to flow from a potentially favourable judgment rather than from the mere fact of participation.[94]

10. The health of the EU legal order

The promotion of the health of the EU legal order is the hardest of these categories for which to find evidence, chiefly because it is unlikely ever to be articulated in a case. It is also unlikely to be a principal motive for participating in proceedings at the Court. However, it may be an underlying reason for Member States to scrutinise incoming preliminary references and to cooperate with other states in agreeing a joint position. What can be said of Denmark is that, despite many reservations and despite its Treaty opt-outs, it recognises that its advantage lies in European integration. Kelstrup argues that it maintains a sort of pragmatic dualism in which it is likely to declare that its domestic policies are in line with EU rules while simultaneously failing

[91] Rytter and Wind (n 16).

[92] Leonor Rossi and Patricia Vinagre e Silva, *Public Access to Documents in the EU* (Hart 2017).

[93] The only example of domestic awareness of arguments being made at the Court uncovered involved Germany: Bill Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949-1979* (CUP 2012).

[94] Case C-127/08 *Metock* EU:C:2008:449.

to implement them in practice or avoiding having them tested at the Court.[95] He contends that, at the same time, Denmark is afraid of being excluded from the benefits of integration. At various points in its membership, Denmark has laid greater or lesser emphasis on the benefits of participation and of maintaining influence over EU law's direction of travel.

It is essential to recognise that the number of observations made in a subject is at best only a proxy for a state's level of engagement with a particular area of EU law. Denmark illustrates this clearly, negotiating the dilemma of a strong economic interest in EU integration, combined with a generally Eurosceptic parliament and public, by being very selective in its participation at the supranational level.

[95] Kelstrup (n 57) 27.

Ireland

Ireland's accession took place after the enunciation of many of the core principles of EU law. Former Irish President Mary Robinson drew attention to their implications for Ireland's legal system in 1973, and it seems that Ireland did not share Denmark's aversion to the supremacy of EU law. Nevertheless, Ireland was to become an unusual member of the EU. As the 'Celtic Tiger' it enjoyed an economic boom in the years 1973 to 2008 that has been widely attributed to the more than €17 billion it received in EU Structural and Cohesion Funds.[96] It joined the euro area and is a country where the public is relatively well-informed about the constitutional effects of EU membership, not least via media debate surrounding the nine referendums on EU matters that Ireland has held to date.[97] Article 46 of the Irish Constitution provides that any amendment must be approved by referendum; thus, accession to the European Community was achieved via the Third Amendment, which was approved by referendum in 1972 on a 70% turnout. The 1987 decision of the Irish Supreme Court in *Crotty* established a requirement that a referendum also be held on any alteration to the Treaties that altered the scope and objectives of the EU.[98] As a result, Ireland held referendums on the ratification of the Single European Act and the Treaties of Maastricht, Amsterdam, Nice and Lisbon as well as on the European Fiscal Compact in 2012.

Ireland has demonstrated reservations about the Charter of Fundamental Rights of the European Union that reflect its distinctive national traditions. It elected not to follow the UK in the latter's partial opt-out from the Charter but secured a protocol expressing guarantees concerning the right to life, Irish military neutrality and tax harmonisation, Ireland having encouraged business investment via a low rate of corporation tax.[99] Thus Ireland's status as a Euro-enthusiast is at odds with its attitude to certain areas of EU activity

Like Denmark, Ireland has interacted relatively little with the Court of Justice. Irish courts have made few references over the years, and the Irish government only submitted observations in 4.5% of preliminary references in the period of this study. The reason for this lower level of engagement with the Court than the only slightly larger Denmark is not immediately apparent. Unlike Denmark, Ireland does not demonstrate a conspicuous tension between its constitutional

[96] E.g. John Macdonald and Zdeněk Čech, 'The "Celtic Tiger" Learns to Purr', Directorate-General for Economic and Financial Affairs, ECFIN Country Focus Vol 1 Issue 18, 2004).

[97] 'Ireland's EU Referendums' (*eolas Magazine*, February 2012) <https://www.eolasmagazine.ie/irelands-eu-referendums/> accessed 2 August 2020.

[98] *Crotty v An Taoiseach* [1987] IR 713.

[99] Protocol on the concerns of the Irish people on the Treaty of Lisbon [2012] OJ L60/131.

position and its economic interests. There is a relatively low level of hard political Euroscepticism, although the main party of the left, Sinn Féin, has evolved from outright opposition to EU membership to a position of soft Euroscepticism.[100] Although all three 1973 Member States share concerns about immigration and citizenship, Ireland's longstanding Common Travel Area with the UK[101] and the fact that Ireland's switch from net emigration to immigration (of which two-thirds has come from the EU) has coincided with a period of economic growth and modernisation, have rendered immigration less politicised.[102] The Irish public is considered to regard European integration favourably.[103] Ireland's reasons for its low engagement with EU law are distinct from those of Denmark, except insofar as both are small countries, and are, arguably, to be found in its relationship with the UK.

Ireland's activity at the Court of Justice

Falkner and Treib describe Ireland's record on transposing and implementing EU law as a 'combination of politicized transposition and systematic shortcomings in enforcement and application.'[104] One would expect flawed transposition to result in more litigation as well as more direct actions. The latter is evident (100 direct actions for failure to fulfil its obligations, as compared with 27 against Denmark and 102 against the much larger UK) but the former is not: Fahey describes the Irish national courts as having 'responded patchily to the actions or inaction of the Irish legislature' and considers that 'litigants and society at large are adversely affected.'[105] Falkner and Treib characterise Ireland as belonging to the 'world of dead letters', in which transposition is backed up neither by systematic application nor by judicial action initiated by the individuals affected.[106]

Not surprisingly, in the world of dead letters, preliminary references are rare. Irish courts have made few preliminary references over the years—61 decided cases from 1973 to 2013—making

[100] Brigid Laffan and Jane O'Mahony, *Ireland and the European Union* (Palgrave Macmillan 2008) 88.

[101] Effectively in place since 1923.

[102] Laffan and O'Mahony (n 100) 241.

[103] John O'Brennan, 'Ireland's National Forum on Europe: Elite Deliberation Meets Popular Participation' (2004) 26 Journal of European Integration 171.

[104] Falkner and Treib (n 15) 308 & Table 1.

[105] Elaine Fahey, 'On the Assessment of the Operation of EU Law in the Irish Courts since Accession (UACES Conference, 40 Years since the First Enlargement, London, 7-8 March 2013)' (2013) <https://www.uaces.org/archive/papers/abstract.php?paper_id=683> accessed 11 August 2020.

[106] Gerda Falkner and Oliver Treib, 'Three Worlds of Compliance or Four? The EU-15 Compared to New Member States' (2008) 46 JCMS 293, 308; European Commission Press Office, 'Ireland's Compliance with EU Law - 2012 Report'.

Ireland one of the seven Member States that have had more actions for failure to fulfil obligations than preliminary references per year of membership, and the one with the third-highest disparity.[107] Up to the end of 2013, unlike in Denmark, there was little evidence of an upturn in references from the national courts. However, there has been something of an increase since the period of this study, with a high point of eleven references from Irish courts in 2017.

The Irish government has submitted 248 observations, 33 in Irish cases and 215 in other Member States' cases (Figure 18). As with Denmark, the increase in its rate of submitting observations (from just over 2% in the 1970s to 6.5% in the decade to 2013) suggests that the Irish government is coming to recognise that the Court represents an arena in which a small country can attempt to influence the evolution of EU law.

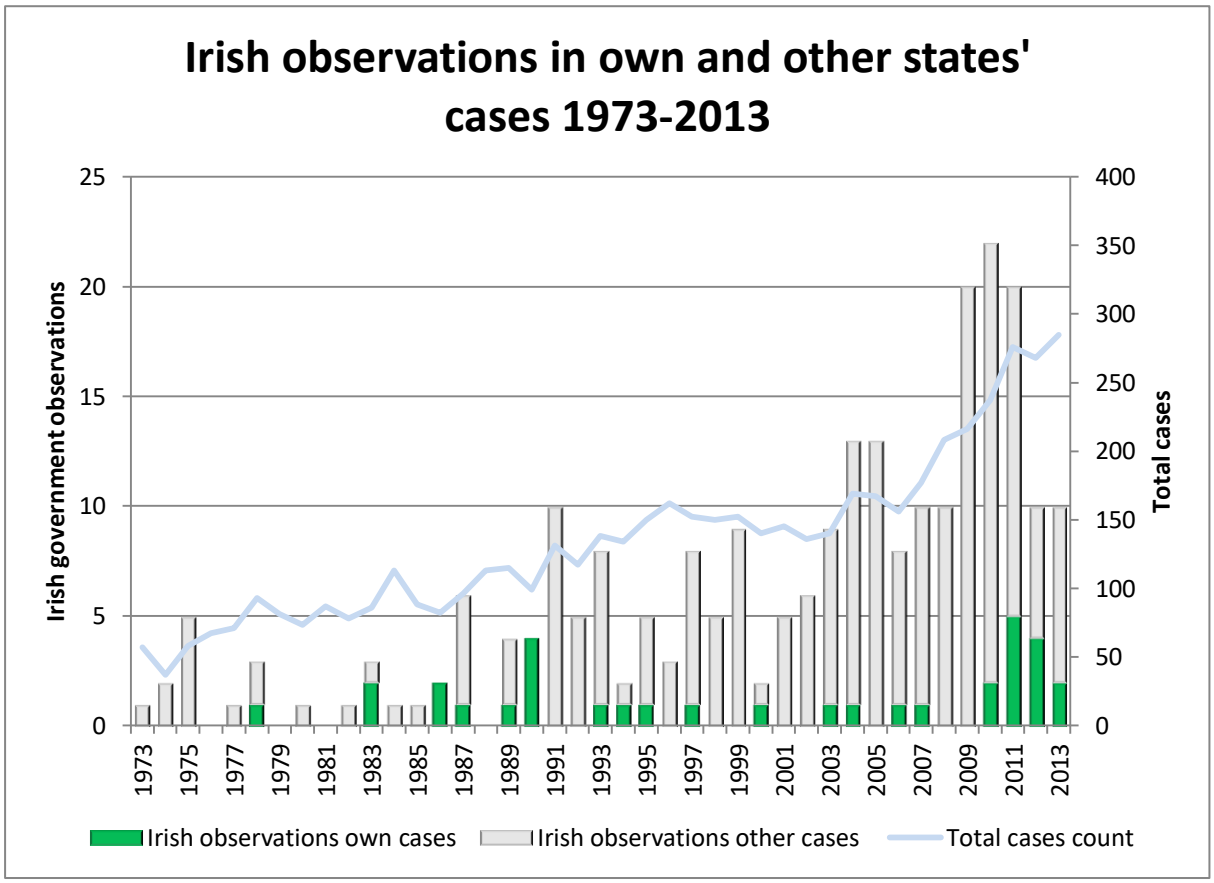

Figure 18: Irish observations in own and other states' cases

[107] After Greece and Luxembourg.

Subject areas

The subject areas in which the Irish government has submitted the highest percentage of observations have been citizenship (16% of cases), visa and asylum cases (12%) and social policy (12%). This indicates similar preoccupations to Denmark. It could be argued that Ireland's longstanding free movement agreement with the UK causes the Irish government to view free movement as an issue for the UK and Ireland jointly. Ireland's participation has been low in the areas where Ireland had opt-out protocols in the Treat of Amsterdam and in those parts of the Treaty of Lisbon relating to cooperation in criminal matters, with observations in only 4% of AFSJ cases. Ireland's concerns about the uneven harmonisation of criminal justice standards across the EU have led it to limit its implementation of the European Arrest Warrant (EAW)[108] and to resist extradition where the Irish courts have considered that to do so would contravene a suspect's rights under the ECHR.[109] This is an area of law where Ireland has simply denied the unqualified jurisdiction of the Court, which may explain why Ireland neither referred, nor made observations in, any cases on the EAW in the period of this research.[110]

Taxonomic analysis

Ireland's submissions to the Court that can be argued to exemplify the taxonomy of motives set out in Chapter 5 are described below.

1. Immediate interest in the outcome of a national case

Taking cases where the referring Member State made the only submissions, there were ten cases between 1973 and 2013 in which Ireland submitted the only observations. Three concerned agriculture and three social policy, with no other topic occurring more than once. The earliest of these, *Pigs and Bacon Commission*, will serve as an example.[111] The case raised several issues, among them the legality of Ireland's state aids to the pigmeat industry, and the Irish government's observations were dominated by an unsuccessful defence of their existing system of support for the industry. At the other end of the scale, Ireland has submitted observations in a number of cases that have consequences across all Member States. *Metock* is again a notable

[108] Dermot Walsh, 'Criticism of Irish over Arrest Warrant Is Wrong' *The Irish Times* (Dublin, 28 February 2013).

[109] Eoin Carolan, 'Reciprocity and Rights under the European Arrest Warrant Regime' 197; The Minister for Justice, Equality and Law Reform v Bailey [2011] IEHC 177.

[110] Ireland made six referrals on the EAW between 2014 and 2018.

[111] Case 177/78 *Pigs and Bacon Commission* EU:C:1979:164.

example.[112] This reference from an Irish court had immediate consequences for Ireland's implementation of Directive 2004/38/EC. The Irish Ministry for Justice, Equality and Law Reform (the government made no separate submission) presented observations in defence of Irish legislation in particular, and of the supposed right of Member States to determine their own immigration rules for the non-EU spouses of EU citizens in general. Other examples are *D and A*, and *M*, in which Ireland submitted observations in defence of its national procedures for examining asylum claims under Directive 2004/83/EC.[113]

Evidence is thin of Ireland intervening in cases in support of Irish companies or industries independently of defending Irish legislation, although in *Pigs and Bacon Commission* the legislation being defended was itself designed to benefit an entire domestic industry.

2. and 3. Preferred answer on a technical issue or a provision or principle of EU law

Despite the considerable overlap between these categories, cases can be picked out in which a Member State submits observations in a case whose outcome is unlikely to have immediate domestic effects. An apparently straightforward example would be *Spector*, in which the Irish government argued for a strong interpretation of the rules on insider trading.[114] The fact that a case will not, of itself, have any consequences at the level of EU law does not, however, preclude the possibility that the matter is of national interest. In this instance, the Irish High and Supreme Courts had recently wrestled (for 87 days in the case of the High Court) with similar facts in *Fyffes v DCC*.[115] It can be argued that governments are most likely to intervene if the issues involved have come up at the domestic level—even if the facts in the domestic case did not put it within the scope of EU law—or if they can envisage such a case occurring. Nevertheless, member-state governments may have a preferred answer to a question referred that appears to have no domestic implications or, as will be argued in respect of the UK, which runs *counter* to their immediate interests.

4. Support for another Member State

Ireland's close relationship with the UK could be argued to have had conflicting effects on its participation in cases at the Court of Justice. In terms of observations, Ireland has made submissions in more cases referred by the UK than any other country, 28% of its submissions

[112] Case C-127/08 *Metock* EU:C:2008:449.

[113] Case C-175/11 *D and A* EU:C:2013:45; Case C-277/11 *M* EU:C:2012:744.

[114] Case C-45/08 *Spector Photo Group* EU:C:2009:806.

[115] *Fyffes v DCC* [2007] IESC 36.

being in UK cases, equivalent to 15% of all cases referred by UK courts. For comparison, 23% of Ireland's submissions have been in cases from the German courts, equating however to only 3% of those, and 13% in Irish cases, equating to 54% of the total. In terms of making preliminary references, however, Fahey observes that '[t]he failure of the State to ... contribute to policy areas from which it is excluded is then notable, instead leaving the UK to exercise a more dominant role in this regard.'[116] This failure may be attributable to Ireland's more limited resources; other closely linked states might have made similar choices in the cause of cost-saving by the smaller state. In the case of Ireland, this can be contrasted with a more general movement away from the patron-client relationship that had dominated British-Irish relations before they acceded to the EEC and towards a more equal regional partnership.

Ireland's relationship with the UK is in tension with Ireland's image as an enthusiastic member of the EU. Zimmer et al. point to a conflict of interest for the Irish, saying, 'On the one hand, as receivers of subsidies they are closely attached to the southern states, while on the other hand they are affiliated with the English language and Anglo-Saxon constitutional, legal and state traditions'.[117] The shared common law tradition of the two states has been invoked to explain Ireland's tendency to support the UK in direct actions and preliminary references.[118] Ireland followed the UK in opting out of the Schengen Agreement[119], after balancing its advantages with those of maintaining the Common Travel Area between the UK and Ireland, and shared the UK's opt-outs from the AFSJ.[120] Indeed, although the UK subsequently opted into the provisions for police and judicial cooperation, Ireland has mostly chosen to do so only informally.[121] Ireland's policy stance in this area is so tightly tied to the UK's that, according to AG Szpunar in *McCarthy*, 'If the United Kingdom decided that it would no longer rely on its special power not to participate in the freedom, security and justice area, Ireland would decide likewise, for the only reason for its position is that it is linked to the United Kingdom by that common travel area.'[122]

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[116] Fahey (n 105) 9.

[117] Christina Zimmer, Gerald Schneider and Michael Dobbins, 'The Contested Council: The Conflict Dimension of an Intergovernmental Institution' (2005) 53 Political Studies 403, 411.

[118] Fahey (n 105).

[119] Under Protocols 19 and 21 to the Treaty of Lisbon.

[120] Vaughne Miller, 'UK Government Opt-in Decisions in the Area of Freedom , Security and Justice' (2011, House of Commons Library Standard Note SN/IA/6087).

[121] Elaine Fahey, 'Swimming in a Sea of Law: Reflections on Water Borders, Irish (-British)-Euro Relations and Opting-out and Opting-in after the Treaty of Lisbon' (2010) 47 CML Rev 645.

[122] Case C-202/13 *McCarthy* EU:C:2014:345, Opinion of AG Szpunar.

A reading somewhat at odds with this suggestion may, however, be derived from studying Ireland's record in the Council of the European Union. Mattila, Naurin and Lindahl looked at each Member State's likelihood of either voting against the majority or abstaining (Mattila)[123] and the likelihood of two states cooperating to do this (Naurin and Lindahl)[124]. Their findings indicate that Ireland, during the period they studied (2005-6) was the state that was least likely to vote against the majority or abstain from votes on legislative acts (25th of 25), whereas the UK was quite likely to do so (8th of 25). This suggests that Ireland does not follow the UK's lead, though it should be noted that the overall number of negative votes and abstentions was very small. I repeated the exercise for 2008, using the search facility on the Council website. During this period there were 149 voting results. The Schengen opters-out Denmark, Ireland and the UK were not included in 3 voting results. Ireland abstained alone on two occasions, on emissions trading and agricultural customs cooperation, and abstained alongside the UK once, on plant protection. The UK abstained once, on aviation security. The small number of non-unanimous votes makes voting patterns poor predictors of Member States' behaviour in Council, as pre-vote negotiations cannot be deduced. However, what information *is* available does not, of itself, suggest that Ireland's voting pattern is influenced by the UK's. Conversely, Hix, examining the period from 2009-2015, found that the UK was more likely to vote with France than with Ireland.[125]

It is important to recognise that, while Ireland may have submitted observations in many cases from UK courts, it does not always offer the same answers as the UK government. It does, however, do so in a slight majority. CERGU analysed the Reports for the Hearing from 1998-2008 at the level of individual questions referred and found that, of the 221 occasions where both Ireland and the UK suggested answers to a question, they submitted the same answer to 126 questions, which is 57% of the total.[126] On a further 65 questions, one or the other country offered an answer that could not be classified sufficiently for a comparison to be made between the governments' positions, leaving only 30 questions upon which they took opposing positions, or 14%. Considering only the 129 individual questions referred by UK courts, Ireland agreed with the UK government's proposed answers to the same percentage of questions, 57%, and disagreed in 13%. Thus, on this sample, Ireland is no more likely to support the UK's position on questions

[123] Mattila (n 25).

[124] Naurin and Lindahl (n 25).

[125] Hix and Hagemann (n 40).

[126] Daniel Naurin and others, 'Coding Observations of the Member States and Judgments of the Court of Justice of the EU under the Preliminary Reference Procedure 1997-2008' (2013) CERGU Working Papers 2013:1.

referred than it is to agree with the bulk of Member States. It is, however, more likely to intervene in UK cases than in those of other Member States.

There are several possible explanations for a high rate of agreement between Member States that do not imply domination of one government by another and that are pertinent to Ireland. Larsson considers several interpretations of Member States' shared preferences, considering both their attitude to the EU and domestic factors. He argues that states may share positions on 'more Europe' versus 'less Europe' which will lead them to answer questions in the same way: that is, in favour of more regulation at the supranational level or towards maximising national autonomy. Alternatively, they may draw agreement from their shared domestic economic models. Larsson attributes the general agreement between Ireland and the UK partly to their shared liberal market economies.[127] While it is plausible for the two states to have a similar attitude to, for instance, regulation of business, it should be noted that the explanation would predict that Denmark, which Larsson (drawing on Scharpf) classifies as a welfare state economy, would take a different view from the other two 1973 accession states.[128] However, of the 46 occasions on which Ireland answered the same question as Denmark, the two Member States agreed on 63% of the questions and definitely disagreed on only 9%. Within this small sample, the effect of any differences in the states' economic models on their observations at the Court cannot be convincingly demonstrated. Indeed, Denmark and Ireland may be more similar to each other than either is to the UK, both being small but relatively prosperous (in terms of GDP per capita) countries with large agricultural sectors (Table 6). What demands further research is what, if any, effect the existence of the Common Travel Area has on Ireland's participation in relevant cases as compared with that of Denmark. This would be challenging because, as was noted above, the Danish government shows concerns over free movement and citizenship that may manifest in similar ways.

In conclusion, it can be argued that Ireland's connection with the UK does influence its level of engagement with the Court, but not in a straightforward manner. Other shared characteristics may influence Ireland's tendency to submit observations relatively often in UK cases, independent of the relationship between the two Member States. Ireland's low submission rate can be attributed to its connection with the UK in some areas, such as those connected with the Common Travel Area, but in other areas is more likely to be a result of its small size.

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[127] Olof Larsson, 'Minoritarian Activism: Judicial Politics in the European Union' (PhD Thesis, University of Gothenburg 2015) 105.

[128] Fritz W Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"' (2010) 8 Socio-Economic Review 211, 215.

5. National constitutional interests

Ireland's constitution explicitly provides for both judicial review of primary legislation[129] and referendums.[130] This distinguishes it from both the UK—with which it otherwise shares a common law tradition—and from Denmark. Both factors can be argued to influence Irish public opinion and Ireland's participation in proceedings at the Court.

Ireland held referendums before ratifying the Single European Act, the Treaty of Maastricht, the Treaty of Amsterdam, the Treaty of Nice (twice) and the Treaty of Lisbon (twice). This can be argued to have led to high public awareness of the debating points involved, particularly on those occasions when referendums were repeated after treaty revisions and public information campaigns. The most recent Irish referendum on Europe was held in 2012 to allow Ireland to ratify the European Fiscal Compact,[131] before which considerable efforts were made to engage the public's enthusiasm for the vote and to explain the complex economic issues involved.[132] Elkink, Quinlan and Sinnott found that the public's voting patterns in the Lisbon Treaty referendums were explicitly linked to their support for European integration and that such support was influenced by campaigning.[133] It is also notable that Hooghe and Marks found Ireland to be the country with the smallest gap between the level of support for European integration shown by the public and that shown by people in positions of authority.[134]

Ireland's constitution confers the power of judicial review on its Supreme Court, and it seems that the Supreme Court, in its turn, has been open to supranational provisions. As ex-Advocate General Nial Fennelly says, Ireland '… applied *Factortame* before *Factortame* and *Francovich* before *Francovich*.'[135] Concerning the former, Fahey[136] contrasts the Supreme Court's untroubled

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[129] Bunreacht na hÉireann (Constitution of Ireland) (1937), Articles 15.4.1° and 26.1.1°.

[130] Bunreacht na hÉireann (Constitution of Ireland) (1937), Article 27.5.1°.

[131] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

[132] J O'M, 'Irish Ayes: Ireland's Referendum on the Fiscal Compact' *The Economist* (London, 2 June 2012).

[133] Richard Sinnott and Johan A Elkink, 'Attitudes and Behaviour in the Referendum on the Treaty of Lisbon: Report Prepared for the Department of Foreign Affairs' <https://www.ucd.ie/t4cms/11-4%20Elkink%20Quinlan%20Sinnott.pdf > accessed 14 October 2019.

[134] Liesbet Hooghe and Gary Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2009) 39 British Journal of Political Science 1.

[135] Nial Fennelly, 'The Effect of European Community Law on Irish Law and the Irish Constitution' in Anthony Arnull, Piet Eeckhout and George Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (OUP 2008) 446.

[136] Fahey (n 105) 3.

acceptance of an application for interim relief in the 1985 case of *Pesca Valentia*[137] with the constitutional near-crisis induced in the UK by a similar application in *Factortame*,[138] and she describes the Irish judiciary as 'overwhelmingly pro-communautaire'.[139] This may well be partly because several senior Irish judges have been judges at the Court of Justice, but despite the evidence of *Factortame*, it is also possible to argue that common law traditions may predispose both Ireland and the UK towards acceptance of the judge-made law of the *acquis*. Equally, if, as De la Mare and Donnelly suggest, one reason for governments to take part in discourse with the Court is to promote their own legal culture, Ireland may participate less because it perceives the EU's legal culture to be a good fit with its own.[140]

The combination of a government that recognises the legitimacy of judicial review, a pro-communautaire judiciary and a public that has regularly been consulted on matters of EU law might be expected to lead to both a higher frequency of references to the Court and to a readiness on the part of the Irish government to seek to influence the Court. However, such an effect cannot be assumed, particularly in the context of a small country that is in several senses outweighed by its larger neighbour.

Ireland has made relatively few submissions in the classic constitutional cases. It made observations that echoed the UK's position in the *Factortame* cases and also intervened in support of the UK in the related direct action on freedom of establishment. However, that litigation followed a similar Irish case (*Pesca Valentia*),[141] and Ireland had a direct interest in the results.[142] Other notable cases referred by other Member States such as, for instance, *Simmenthal* drew no Irish submissions.[143] Ireland's observations in constitutional cases have mainly been confined to cases referred by its own courts. One such case, however, represents a strong example of Ireland wishing to upload its constitutional preferences to the EU as well as to defend its

[137] *Pesca Valentia v Minister for Fisheries* [1985] IR 193.

[138] Case C-213/89 *R v Secretary of State for Transport, ex p Factortame* EU:C:1990:257.

[139] Fahey (n 105) 3.

[140] de la Mare and Donnelly (n 9) 381.

[141] Case 223/86 *Pesca Valentia* EU:C:1988:14.

[142] Case C-213/89 *R v Secretary of State for Transport, ex p Factortame* EU:C:1990:257; Case C-221/89 *R v Secretary of State for Transport, ex p Factortame* EU:C:1991:320; Joined cases C-46/93 and C-48/93 *Brasserie du pêcheur and R v Secretary of State for Transport, ex p Factortame* EU:C:1996:79.

[143] Case 106/77 *Simmenthal* EU:C:1978:49

consequent legislation. This case was, of course, *Grogan*,[144] in which the freedom to provide services served as a proxy for Ireland's express constitutional ban on abortion.[145]

The status of *Grogan* as a case which is regarded by Ireland as concerning a constitutional issue rather than a mere policy preference puts it into a small category of cases concerning particular national apprehensions. Perhaps the nearest comparable case is *Omega*, in which Germany defended a ban on a laser game on the basis that 'the commercial exploitation of a 'killing game' … constituted an affront to human dignity, a concept established in the first sentence of Paragraph 1(1) of the German Basic … Law, although in the latter case the constitutional connection was less direct.[146] In *Grogan,* both the plaintiff (an anti-abortion organisation) and the Irish government argued that Ireland's constitutional provision could be used to restrict the dissemination of information about abortion providers in the UK, although the Court's decision ultimately sidestepped the issue.

An equally relevant case is *Groener*, in which the Court upheld a requirement that a Dutch national who had successfully held a temporary post in which she taught in English could nevertheless be required to be fluent in Irish to gain a permanent position.[147] The Irish government explained its policy of reviving the Irish language—Ireland's first language according to its constitution—and the Court was willing to put Ireland's constitutional concern above the requirement in Regulation (EEC) No 1612/68 that language requirements must be reasonable and necessary for the job in question.[148]

6. Economic and political/policy preferences

Laffan and O'Mahoney emphasise that, since its membership, Ireland's public policy has been profoundly influenced by that of the EU. Ireland has sought economic change within the European context, developing away from being an almost exclusively agricultural economy and beginning to shake off its co-dependent relationship with the UK.[149] The degree to which Ireland, as a small Member State, has been successful in uploading its own economic and policy

[144] Case C-159/90 *SPCU Ireland v Grogan* EU:C:1991:378.

[145] Bunreacht na hÉireann (Constitution of Ireland) (1937), Article 40.3.3º (in force 1983-2018).

[146] Case C-36/02 *Omega Spielhallen* EU:C:2004:614 para 11.

[147] Case C-379/87 *Groener* EU:C:1989:599.

[148] Bunreacht na hÉireann (Constitution of Ireland) (1937), Article 8.1.

[149] Laffan and O'Mahony (n 100) 7.

preferences to the EU is harder to quantify, but it is possible to examine the extent to which Ireland has availed itself of the possible routes towards that goal.

Analysis of Council voting shows that Ireland is one of the Member States that is least likely to abstain or vote against a proposal.[150] Meanwhile, Panke finds that Ireland has been relatively active in negotiations in EU working parties and the Committee of Permanent Representatives, COREPER.[151] While Laffan and O'Mahoney observe that 'ensuring that there is adequate voice and representation for small states in the Union is a constant in Irish European policy',[152] Naurin and Lindahl found little empirical evidence of Ireland explicitly cooperating with the other small states in their study of coalitions in the Council.[153] Mattli suggests that Ireland's tendency to vote together with other small states in the Council is influenced mainly by their shared status as a net recipient of EU funds.[154] Taken together, these findings suggest that, in the EU's intergovernmental forums, Ireland's main option is to seek influence via preliminary negotiations and soft power rather than by deliberate bloc voting.

It might be argued that participating in proceedings at the Court would allow Ireland to influence EU law on a level playing field with larger states, and thus compensate for its inevitably less influential position in the Council. However, Ireland's small size may also partly explain its low participation rate and therefore its failure to make full use of this avenue of influence. The empirical evidence for this explanation is, however, not convincing. Assuming that a Member State's total GDP is most likely to influence the affordability of participating in litigation, Ireland falls into the middle third of economies in the EU, with a nominal GDP similar to those of Portugal and Czechia. However, it is the second least likely to submit observations within that group (Romania being the least) and only a third as likely to do so as Czechia (see Appendix E). Although Ireland claims to speak for the policy concerns of smaller Member States, it does not do so via this route.

Another area where Ireland might have chosen to speak out at the Court is that of matters falling within the Area of Freedom, Security and Justice. Laffan and O'Mahoney were told by a senior official in the Irish Department of Justice, Equality and Law Reform that 'the comments we make

[150] Mattila (n 25) 29.

[151] Diana Panke, 'Small States in EU Negotiations: Political Dwarfs or Power-Brokers' (2011) 46 Cooperation and Conflict 123, 124.

[152] Laffan and O'Mahony (n 100) 260.

[153] Naurin and Lindahl (n 25) 73.

[154] Mattila (n 25) 33, 34.

on proposals on which we opt out are not recorded by the Council … it is a significant loss of influence.'[155] Ireland has, however, not sought to redress the balance via the Court, submitting observations in fewer than 3% of AFSJ cases. Those in which it did concerned the measures on judicial cooperation in civil matters into which Ireland has opted.

There is also little evidence of a general policy of Ireland using the Court of Justice to upload specific economic or political preferences. There are two areas in which it has submitted observations in a relatively higher percentage of cases: citizenship, immigration and asylum (considered together) and social policy.[156] The former will be considered under the next heading—the clarification of EU law. Ireland's observations in social policy cases have been relatively evenly spread across the period of its membership, bar some clusters of related cases such as three on pensions in 1991 and three on age discrimination in 2009. Cases on equal pay have continued throughout the period, but in general, Ireland has followed the topical issues with, for instance, a majority of cases on maternity rights in the early 1990s and on age discrimination in the late 1990s/early 2000s. Ireland's observations in the period 1997-2008 show some evidence of uploading, in that Ireland several times took the opportunity to demonstrate to the Court that Irish law was ahead of the curve on social policy matters. For example, in *Coleman*, Ireland's (oral) observations noted that discrimination by association had already been outlawed under their Employment Equality Acts.[157] The same sample suggests that Ireland has no pattern of agreeing with the UK in social policy cases except where both states' direct interests are equally affected.

While social policy cases clearly have economic repercussions for Member States—most notably *Preston*, which was discussed in Chapter 5 and in which Ireland submitted observations—Ireland's participation in cases that reflect either its historical or current economic concerns has been low. Ireland has in made observations in fewer than 3% of the cases on agriculture, in only 5% of tax cases (the vast majority of those on VAT) and 7.5% of cases on the free movement of capital and banking.

In conclusion, Ireland does not appear to have a *general* policy of making observations on cases that touch on its economic strategy—or, indeed, of seeing the Court as an alternative to the Council in influencing EU law in any area other than that of (broadly) crossing borders.

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[155] Laffan and O'Mahony (n 100) 174.

[156] 48 of 434 cases; compare the UK's 43%.

[157] Case C-303/06 *Coleman* EU:C:2008:415; Employment Equality Acts 1998-2004 s 6(1)(b).

7. and 8. Clarifying EU law and guiding its evolution

The areas in which Ireland has contributed most submissions, at least in percentage terms, are those (relatively rare) cases concerning visas, asylum and EU citizenship. The visas and asylum category can probably be dismissed as one in which the Irish government has made a focused attempt to guide the evolution of EU law. The Irish government made observations in six, or 11% of the cases in the period: two from Irish courts plus three major UK cases and one from Germany, all of which garnered observations from numerous Member States.[158] Two of these cases concerned third parties' rights to work under accession treaties and occurred before the Court of Justice acquired a say over asylum matters with the Treaty of Lisbon in 2009. Ireland's contributions in the other four do not appear to have added significantly to the law, its observations in the two Irish cases simply defending its national procedural arrangements.

It could, however, be argued that Ireland's contributions to the 15 citizenship cases (17%) in which it made observations were more purposeful.[159] Ireland came relatively late to the issue of citizenship with *Zhu and Chen* in 2002, since which it has contributed observations in *Metock*, *Ruiz Zambrano*, *McCarthy* and *Dereci* among others.[160]As Lenaerts points out,[161] the law on EU citizenship has been built 'stone by stone' by the Court and Ireland has been involved in this process, albeit by resisting the placing of each stone. Ireland, with the UK, argued against a parent gaining a right of residence in the UK from her Irish citizen child in *Zhu and Chen*—to which it also responded by revoking the constitutional entitlement to Irish citizenship of children born on the island of Ireland that had been a consequence of the Good Friday Agreement.[162] Ireland's Minister for Justice, Equality and Law Reform was the defendant in *Metock*, after which Ireland had to amend its legislation. The Irish government put forward a 'floodgates' argument against similar reasoning to *Zhu and Chen* in *Ruiz Zambrano*;[163] nevertheless, after the judgment, the Minister announced that the Department would implement the Zambrano ruling in its

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[158] Case C-175/11 *D and A* EU:C:2013:45; Case C-277/11 *M* EU:C:2012:744; Case C-235/99 *Kondova* EU:C:2001:489; Case C-257/99 *Barkoci and Malik* EU:C:2001:491; Joined cases C-411/10 and C-493/10 *NS* EU:C:2011:865; Case C-4/11 *Puid* EU:C:2013:740.

[159] Including Case C-127/08 *Metock* EU:C:2008:449, an Irish case in which the Irish government did not make separate observations from those of the ministry concerned.

[160] Case C-200/02 *Zhu and Chen* EU:C:2004:639; Case C-127/08 *Metock* EU:C:2008:449; Case C-34/09 *Ruiz Zambrano* EU:C:2011:124; Case C-434/09 *McCarthy* EU:C:2011:277; Case C-256/11 *Dereci* EU:C:2011:734.

[161] Koen Lenaerts, 'EU Citizenship and the European Court of Justice's "Stone-by-Stone" Approach' (2015) 1 International Comparative Jurisprudence 1.

[162] Irish Nationality and Citizenship Act 2004 s 4; Good Friday (Belfast) Agreement 1998.

[163] Case C-34/09 *Ruiz Zambrano* EU:C:2010:560, Opinion of AG Sharpston para 114.

procedures.[164] The judgment was followed by more than a thousand applications for Irish citizenship from the non-EU parents of children who had been born Irish citizens before 2005.[165] Ireland's observations in *McCarthy* are not available, although it is likely that they took a similar conservative line to the UK, this time in accordance with the eventual judgment. In *Dereci*, Ireland was among the governments arguing that none of the families involved would be deprived on any of their rights as EU citizens by a failure to grant residence to a non-EU family member—an argument with which the Court again agreed.

It can be argued that Ireland's interest in the evolution of the law on EU citizenship, particularly as it affects the status of non-EU family members of EU citizens, reflects the change in its status from a country of net emigration to one that has become a desirable destination for immigration.

9. Political benefits from participation

The political benefits of participation in the Court's proceedings may, as noted in the discussion of Denmark, accrue at both the international and domestic levels. It was suggested above that Member States may bolster their international standing simply from participation, whereas domestic political benefits are more likely to accrue from presenting successful legal arguments to the Court, particularly in national cases.

At the international level, Ireland shares with Denmark the reputational disadvantage of having opt-outs from various provisions of the Treaties.[166] Ireland's international standing is, however, more complex: Ireland's neutrality, its boom years as the Celtic Tiger followed by its bail-out, its relationship with the UK and its entanglement with the politics of Northern Ireland all affect its reputation. Laffan and O'Mahoney argue that Ireland takes the opportunities offered at Council level for exercising soft power, the use of which could be argued to be predicated on a Member State having sufficient reputational capital.[167] However, it is less clear that Ireland takes a strategic attitude to its participation at the Court. What can be said is that, in contrast to some small Member States, it has increasingly participated in those cases with EU-wide implications such as *NS* on asylum, *Cadbury Schweppes* on tax and *Laval* and *Viking* on workers' rights

[164] Roel Fernhout and Ries Wever, 'Thematic Report 2010-11: Follow-Up of the Case Law of the Court of Justice of the European Union' (2011) 74.

[165] Jamie Smyth, 'Deported Parents of Irish Children Apply to Return' *The Irish Times* (Dublin, 9 July 2011).

[166] Naurin and Lindahl (n 5).

[167] Laffan and O'Mahony (n 100).

versus the freedom to provide services and the right of establishment.[168] At best, Ireland could be described as an infrequent but mainstream participator.

For there to be political benefits to the government, the most important prerequisite is for the public to be made aware of its government's participation and standpoint in cases at the Court. Ireland benefits from regular reporting of legal matters in The Irish Times—the second-highest circulation newspaper in Ireland—including Irish appointments to the Court of Justice and coverage of cases in which Ireland is concerned. For example, it published eight articles on *Metock*, one of which notes both Ireland's position in the case and its subsequent lobbying (with Denmark and Austria) to change Directive 2004/38/EC.[169] This in itself does not necessarily imply that Ireland's position provided a political benefit to the government of the day (the centre-left Fianna Fáil party at the time), but it does demonstrate the necessary precondition: that the Irish public was informed of its government's attempts to frame this important issue of EU law.

10. The health of the EU legal order

As noted above, it is hard to find explicit evidence of a Member State's desire to promote the health of the EU legal order within its observations, even when its government is notably pro-communautaire. One way of estimating the degree to which the Irish government takes a pro-EU position in its observations is by analysing its suggested answers to referred questions in terms of their support for EU-level authority versus national autonomy. The University of Gothenburg's analysis of the answers to individual questions referred from 1998-2008 found that Ireland supported control over the issue at the EU level in 35% of its answers and member-state autonomy in 32%. The remaining questions had no obvious implication for the balance of power between the EU and the Member States.[170] The percentages of EU-supportive versus national-autonomy-supportive observations are almost the same as those of Denmark (35% and 30%) despite the two states' contrasting images as pro- and anti-communautaire. These limited empirical findings cannot distinguish between two possibilities: that, notwithstanding their images at the senior government level, the two governments are in fact similarly disposed towards EU law at the departmental level at which submissions are compiled, or that observations are a poor measure of government commitment. However, given that the Member States'

[168] Case C-341/05 *Laval* EU:C:2007:809; Case C-438/05 *Viking* EU:C:2007:772; Joined cases C-411/10 and C-493/10 *NS* EU:C:2011:865; Case C-196/04 *Cadbury Schweppes* EU:C:2006:544.

[169] Jamie Smyth, 'Irish Request to Change EU on Freedom of Movement Rejected' *The Irish Times* (Dublin, 11 December 2008).

[170] Naurin and others (n 126).

observations are frequently directed towards defending their implementation of EU law, the fact that over a third of suggested answers are in favour of EU-level control can be argued to support other findings that Ireland at least *regards* itself as a good EU citizen.[171] Other evidence for a Member State's commitment to reinforcing the EU legal order might be found in its degree of compliance with EU law as measured by direct actions at the Court, in which context Ireland may be regarded as less of a good citizen.[172]

Despite the generally pro-European stance of the Irish business community, government, public and especially the judiciary, Ireland has participated relatively little in the preliminary reference procedure. In particular, it has arguably restricted its opportunities to influence the direction of legal evolution in favour of following the UK's lead. However, unlike in Denmark, there seems to be no evidence of systematic blocking by the government. Hypotheses that might be explored include that Ireland's lack of participation is the result of its asymmetric dependence on the EU—Ireland has been a net recipient of EU funds and the government might not have seen any benefit in challenging EU rules—or that its pro-communautaire stance means that, on balance, the government sees little benefit in investing limited resources in challenging EU law. Nevertheless, examples can be found of Ireland making observations for almost all of the reasons that have been identified above. Ireland's dialogue with the Court may be limited in quantity, but it has been broad in scope.

[171] Brigid Laffan and Jane O'Mahony, 'Managing Europe from Home: The Europeanisation of the Irish Core Executive' (2003) OEUE Phase 1 1.1 37; Fahey (n 105) 3.

[172] Deirdre Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 Common Market Law Review 17, 30.

United Kingdom

By contrast with the discussion of Denmark and Ireland, this section seeks to explain the UK government's relatively *frequent* participation in Court proceedings before 2020. This is analysed in terms of the motives laid out in Chapter 5, but also in terms of the UK's historical development of the necessary administrative capacity to respond at will to questions referred to the Court of Justice.[173] It is argued that the UK was more strongly motivated than its contemporaries by a desire to be at the centre of the elaboration and evolution of EU law. Evidence for the UK's motivation has been drawn from interviews carried out in connection with this thesis and from the pattern of the UK's observations in Court proceedings.

UK's activity at the Court of Justice

In terms of cases that were initiated by domestic courts, the UK referred considerably more cases than either Denmark or Ireland, as might be expected from its larger economy (Table 6). In terms of actions for which the government was responsible, the UK was also more active in participating in preliminary reference cases than Denmark and Ireland, submitting observations in slightly over a third of cases referred by UK courts and 16% of those from those of other Member States. The UK government also had unsought interactions with EU law whenever it was on the receiving end of direct actions for failure to implement EU law correctly or in a timely fashion. The UK was the defendant in more actions for failure to fulfil obligations than Denmark, and slightly fewer than Ireland, although at the end of the period studied here it had more direct actions outstanding (Table 6).[174] Nevertheless, the UK was relatively compliant with EU law and faced fewer direct actions than several of the less Eurosceptic large states that were more welcoming of European integration.[175] The UK also participated voluntarily in other direct actions: it was the second most prolific intervener over the five years to 2013, after Czechia and equal with France. Denmark and Ireland were the seventh and fourteenth most frequent interveners respectively.

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[173] Simon Bulmer and Martin Burch, *The Europeanisation of Whitehall: UK Central Government and the European Union* (Manchester University Press 2013); Vaughne Miller, 'House of Commons Library Standard Note: How the UK Government Deals with EU Business' (2012); interviews with Shasa Behzadi-Spencer, Joint Head of EU Litigation at Treasury Solicitor's Department (23 July 2014) and a government agent (14 March 2014).

[174] Court of Justice of the European Union, 'Annual Report 2013' (2013).

[175] Börzel and others (n 15).

It could be argued that the UK's performance in implementing EU law was subject to two opposing forces: an engaged and relatively efficient administration versus a lack of political will. Falkner and Treib consider the UK to belong to 'the world of domestic politics' in which the transposition of EU law was generally prompt unless national politics interfered.[176] An example of the latter situation is discussed by Panke, in which employers' organisations and a Conservative government resisted full implementation of the Collective Redundancies Directive for ten years.[177] Such behaviour was not the rule, however: the UK was towards the higher end of compliance. Over the period from 2009-2013, it received the fewest new actions for failure to fulfil obligations among the large Member States: 11, as compared with Poland (the worst performer) with 47, Italy with 39, France with 31 and Germany with 23.[178] Humphreys says that this was 'a record which ministers [took] very seriously' and that it was a key UK objective that it did not risk being fined.[179]

[176] Falkner and Treib (n 15) 297.

[177] Diana Panke, 'Why the ECJ Restores Compliance Faster in Some Cases than in Others: Comparing Germany and the UK' (2007) 4 16 <http://www.fu-berlin.de/europa>; Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies.

[178] Court of Justice of the European Union (n 174).

[179] James Humphreys, *A Way Through The Woods: Negotiating in the European Union* (Department of the Environment 1996) 115, 123.

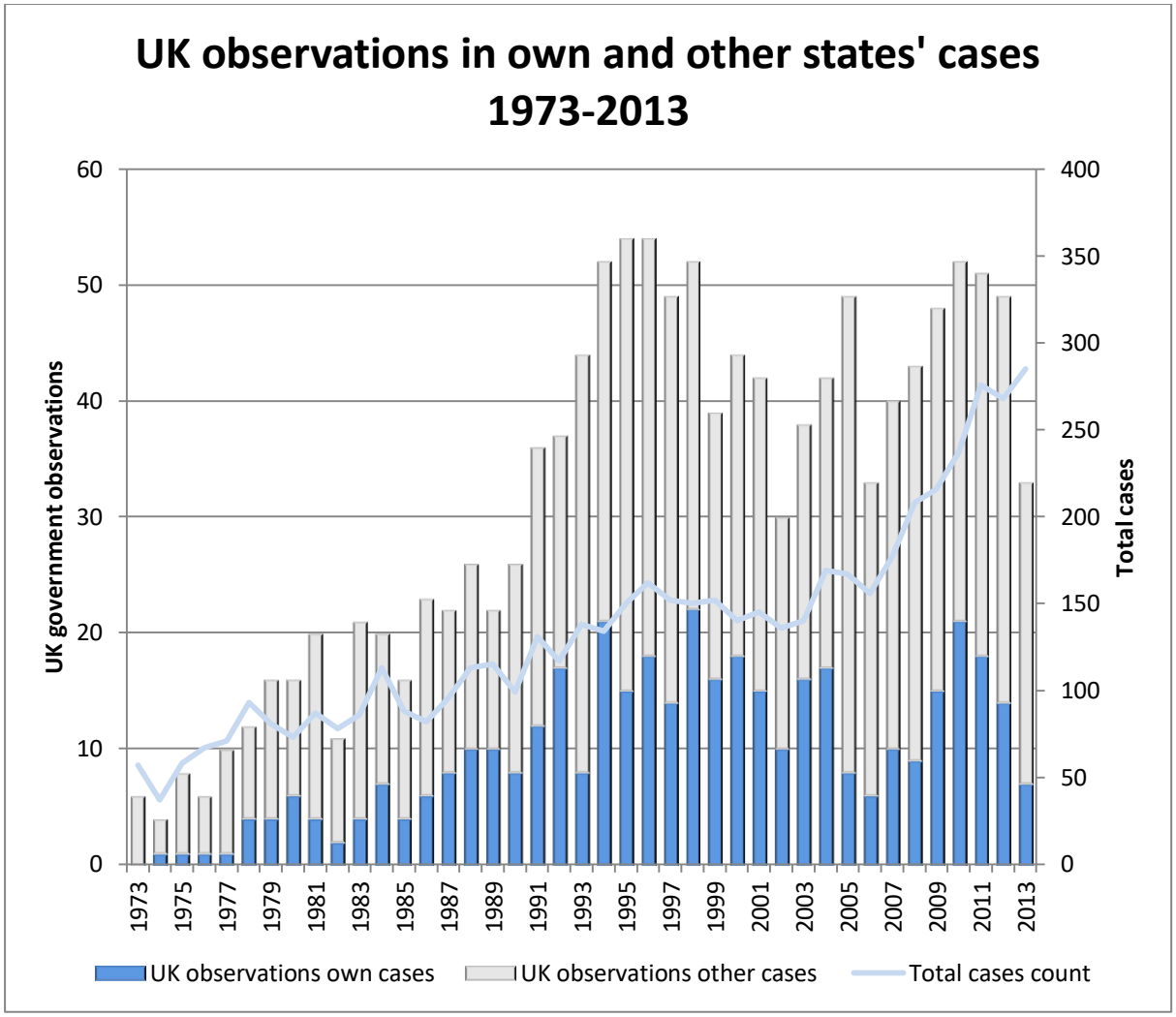

Figure 19: UK observations in own and other states' cases

The UK government submitted observations in 30 to 50 cases annually from the 1990s onwards. However, as the number of cases rose overall, this represented a drop in the percentage of cases where it submitted observations from around 40% in the mid-1990s to around 20% towards the end of the period (Figure 19). The UK nevertheless involved itself in a much higher proportion of cases than Denmark or Ireland. Part of this can be attributed to its greater size, but it can be argued that this was also down to the UK dedicating more administrative capacity to its relationship with the EU. Greer and Martín de Almagro Iniesta argue that the correctness of a Member State's transposition of EU law depends not just on political will but on the attentiveness and willingness of its national bureaucracy.[180] It can be argued that this is equally the case for the

[180] Scott L Greer and Maria Martín de Almagro Iniesta, 'How Bureaucracies Listen to Courts: Bureaucratized Calculations and European Law' (2014) 39 Law and Social Inquiry 361.

submission of observations and that the UK's frequent participation at the Court was down to the centrality of its EU litigation unit.

The EU litigation unit

The UK's primary responsibility for EU law during the period from 1973 to 2013 fell to the Treasury Solicitor's Department (TSol).[181] EU expertise in TSol was split into two teams: an EU litigation unit and the Cabinet Office Legal Advisers (COLA). Note that, although what follows refers to the department's activities in the past tense, some of these activities continue under the aegis of the Government Legal Department.

The UK's submissions to the Court of Justice were coordinated by the EU litigation unit. The EU litigation unit's position within TSol, which provides legal services to the majority of central government departments and which itself answers to the Cabinet Office,[182] made it both organisationally and physically central to the government. As Bulmer and Burch observe, the combination of responsibility for European litigation and for legal advice to government departments in a single section, an arrangement that they consider to have been distinctive to the UK, was a significant factor in the UK's active participation in proceedings at the Court.[183] At the same time, the UK, along with Ireland, was distinctive in instructing private barristers as counsel in cases before the Court, rather than relying solely on in-house lawyers.

In those cases in which a UK government department or agency was a party to the national proceedings, it was the EU litigation unit, rather than that department, that submitted observations to the Court and appeared at the oral hearing. Unlike in (reportedly) Denmark, however, the EU litigation unit could not discourage the making of a reference in the first place.[184] The litigation unit decided which other cases, national or otherwise, required a UK response.

The majority of cases were adopted reactively, in that the EU litigation unit continuously monitored the activity of the Court of Justice, the General Court and the EFTA Court and acted as a triage unit, identifying which government departments might be concerned with a particular legal development and informing them via a standard 'new case letter'. The UK courts also

[181] TSol became the Government Legal Department on 1 April 2015.

[182] The department that supports and coordinates the work of the Prime Minister's office and the various cabinet committees.

[183] Simon Bulmer and Martin Burch, 'Organizing for Europe: Whitehall, the British State and European Union' (1998) 76 Public Administration 601, 615.

[184] Wind, 'The Nordics, the EU and the Reluctance Towards Supranatural Judicial Review' (n 27) 1050.

alerted the litigation unit whenever they were proposing to refer a case. Some areas of the law were also monitored externally; for instance, the Intellectual Property Office (IPO) had (and still has) procedures for monitoring relevant EU cases and informing its customers.[185] It has been suggested that the IPO was so proactive, and its level of engagement with stakeholders so high, that it had to be restrained from exerting undue pressure on the government to submit observations in every case.[186] In addition, some legal firms continue to provide a service of identifying upcoming preliminary references that are relevant to their clients.

In a small number of examples, the UK government specifically kept an eye out for cases that might lend themselves to the clarification of a legal point about which it had concerns, or even to an attempt to overset the Court's previous line of reasoning. An example of the former occurred in the 1990s after the *Barber* decision on pensions, when it is reported that 'the Government, the Equal Opportunities Commission and various trade unions searched for appropriate cases to adopt' concerning several areas of uncertainty.[187]

In deciding whether to intervene, the EU litigation unit weighed the different factors: the benefits and risks of intervening or not intervening, what were the legal concerns, and whether there were other methods of putting the UK's point of view, such as 'piggybacking' on another Member State's submission. The latter option was facilitated by the UK's involvement in formal and informal transnational groups of government lawyers which discussed coordinating national observations.

Once departments came back to the litigation unit with their comments on an upcoming case, the unit checked if there were any fundamental disagreements. If there were, the matter was passed to the Cabinet Office where COLA and the European and Global Issues Secretariat attempted to broker a solution. Very occasionally, no agreement could be reached because two departments' policy goals were irreconcilable.[188] This usually involved an issue of principle, in which circumstances the UK did not submit observations in the case. That this situation was rare was, it

[185] Intellectual Property Office, 'References to the Court of Justice of the European Union' (3 December 2019) https://www.gov.uk/government/publications/references-to-the-court-of-justice-of-the-european-union accessed 13 December 2019.

[186] Personal communication from Professor Lionel Bently to author (8 February 2016).

[187] Case C-262/88 *Barber* EU:C:1990:209; R V Williams, 'Equal Treatment: Barber - The Pace Warms Up', *International Association of Consulting Actuaries 13th Conference, Vancouver, Canada May 24 - 28, 1992* (1992) 259.

[188] Interview with Shasa Bezhadi-Spencer, Joint Head of EU Litigation at Treasury Solicitor's Department (23 July 2014), who could think of only one instance where this had occurred.

can be argued, a benefit of having a central, non-ministerial department coordinating the government's response. In Germany, as noted in Chapter 3, the procedure is that if ministries disagree, there will automatically be no brief submitted by the government, and this impasse arises much more often.[189]

Of course, it is possible for no observation to be submitted because the government either failed to spot that an issue of importance was lurking in an apparently technical case—*Ratti* and *Marleasing* might be cited as examples—or did not believe that a particular result was possible.[190] *Mangold* reportedly came as a great shock, especially as, where issues of principle emerge from a case, the Court normally invites submissions from interested parties.[191]

In normal circumstances, however, the litigation unit and their chosen counsel worked together to prepare a written submission, which might in exceptional cases have reached many thousand words and constituted a comprehensive analysis of the state of the law. Former judge of the Court Sir David Edward remarks that the UK's contributions were considered to be singularly helpful:

> What has become more noticeable in recent years is the very high quality of British written pleadings, particularly those submitted by the United Kingdom government. More than one member of the Court has remarked that the quickest way to find out what a case is really about is to read the submissions of the UK government.[192]

Edward attributes this partly to the extensive consultation between government departments.

The oral stage of the proceedings depended heavily on the skills of the advocate instructed by TSol, who had a maximum of twenty minutes to recap the UK's chosen position, to stress any arguments raised by others that supported that position, and to put forward any new arguments that might have arisen after the close of the written procedure. This last had to be exercised judiciously as the Court may refuse to consider new material that cannot be shown to be connected with the arguments made in writing. Again, Edward notes that the UK's submissions were considered to be of high quality, which he attributes to the use of independent counsel experienced in oral advocacy. Indeed, he notes that it was only with the UK's accession that the

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[189] Ariane Weidmann, 'Litigation before the Court of Justice of the European Union - from the Perspective of the Federal Republic of Germany' (talk at Centre for European Legal Studies, Cambridge, 30 October 2013).

[190] Case 148/78 *Ratti* EU:C:1979:110; Case C-106/89 *Marleasing* EU:C:1990:395.

[191] Case C-144/04 *Mangold* EU:C:2005:709.

[192] David Edward, 'The British Contribution to the Development of Law and Legal Process in the European Union' in BS Markesinis (ed), *The British Contribution to the Europe of the 21st Century* (Hart 2002) 31.

members of the Court started to make a practice of putting questions to counsel appearing before them.[193]

In conclusion, the UK's high participation rate and perceived influence over the outcome of proceedings can be attributed to the coordinating influence of TSol and to the UK's use of highly experienced barristers to draft and put forward the UK's observations.

The question that remains is why, historically, the UK had put these procedures in place. Bulmer and Burch attribute the UK government's finely tuned responses to the length of time that Whitehall had taken an interest in EU law, which considerably predated the UK's membership. They argue that it is necessary to look at the period of negotiations before the UK joined the Common Market, starting in the 1960s, in order to find the origin of the institutional practices that continued throughout the UK's membership; some, indeed, could be traced to the early 1950s.[194] The Cabinet Office acquired responsibility for negotiations and policy coordination during the second application of 1966. It can be argued that the (in effect) three rounds of negotiations enabled the UK to refine the governmental machinery that, after accession, could be employed to coordinate the UK's response to EU legal matters.

Subject areas

Table 8 shows the proportion of cases on various topics in which the UK submitted observations during its membership. It did so most frequently in cases on people: social provisions, citizenship, the Area of Freedom, Security and Justice and the free movement of workers. The next most common area was financial cases: tax, free movement of capital and banking issues: this is unsurprising, not just because of the UK's self-perception as an international financial powerhouse, but also because tax cases, though neglected in constitutional readings of the Court's activity, are among the most frequent to come before the Court.[195] The UK also involved itself frequently in asylum and visa cases, and disproportionately infrequently in cases on agriculture and competition. Nevertheless, the UK's choice of subject areas was unremarkable. This tends to confirm the observation made in Chapter 1—that so-called constitutional cases appear not to predominate. Although the UK's contribution to those cases might have been important, it is

[193] Edward (n 192) 31.

[194] Bulmer and Burch (n 173) 65, 67.

[195] For instance, since 1980 there have been 609 cases on tax, compared with 775 on agriculture and (the most common) 893 dealing with free movement of goods.

arguably the persistence of its presence in the Court's everyday business that was the largest part of its influence, and one that is underestimated in the literature.[196]

Table 8 UK observations by subject area

Subject	% of cases in which UK submitted observations
EU citizenship	44.3
Social provisions	43.8
AFSJ	40.4
Visa/asylum/immigration	38.6
Free movement workers	30.3
Free movement of capital/banking	30.1
Tax	27.0
Environment	24.7
Freedom of establishment & services	21.7
Social security	19.8
Free movement of goods	18.2
Competition	18.2
Agriculture	12.4

Taxonomic analysis

In this section, the UK's submissions in preliminary references cases are analysed in terms of the motives set out in Chapter 6.

1. Immediate interest in the outcome of a national case

There were 136 UK cases in the period studied in which the UK was the only government to submit observations, making up 29% of the cases referred by UK courts. These are presumed to be cases of immediate, though not necessarily only, national interest. Some should probably have been recognised as having general significance (*van Duyn* and possibly *Carpenter*); others have

[196] I make this argument at greater length elsewhere: Estelle Wolfers, 'The role of the preliminary reference procedure in European integration' (LLB dissertation, Anglia Ruskin University 2011).

acquired importance with the benefit of hindsight, such as *McCarthys v Smith*, *Marshall* and *Foster v British Gas*.[197] Others, however, are indeed cases that were of mainly national interest. These are divided between those where the government was financially concerned or defending national legislative measures, and those where it was defending British industry without having a direct interest. An example of the former is *ClientEarth*, in which an environmental organisation was challenging the UK's postponement of the deadline for achieving certain air quality standards. The UK's concern was immediate; while the Court's judgment had the potential to be relevant to other governments that were struggling to meet the standards, the result would only directly affect the UK.[198] An example of the UK government acting in support of national industry rather than in defence of its finances or legislation was noted in the previous chapter in *Preston*, where the government argued in its observations, '[W]hile it is difficult to estimate the amounts of money at stake in these proceedings, it would appear that … the financial consequences for employers and pension schemes could run to thousands of millions of pounds.'[199] Its arguments were ultimately unsuccessful, an outcome that is underlined by the fact that the factors used in the calculation of a part-time worker's entitlement to an occupational pension are now referred to as 'Preston factors'.[200]

2. Preferred answer on a technical issue

As noted before, a Member State's preferred answer on a narrow technical issue may be underlain by a fiscal issue or the need to avoid redrafting national rules. There are, however, cases where it is hard to discern any significant national concern. Cases where the UK's observations appear to have disclosed no interest—financial or otherwise—in the outcome include *Hamilton v Whitelock*, in which the Court discussed whether or not breakdown vehicles were required to be fitted with tachographs;[201] *Wachauf*, in which the UK argued that a milk quota could not be classified as an intangible asset; [202] and *Centro Stauffer*, on the German rules for tax exemptions as applied to a charity which was based in Italy and benefitted only Swiss

[197] Case 41/74 *Van Duyn* EU:C:1974:133; Case 129/79 *Macarthys v Smith* EU:C:1980:103; Case 152/84 *Marshall* EU:C:1986:84; Case C-188/89 *Foster v British Gas* EU:C:1990:313; Case C-60/00 *Carpenter* EU:C:2002:434.

[198] Case C-404/13 *ClientEarth* EU:C:2014:2382.

[199] Case C-78/98 *Preston* EU:C:2000:247.

[200] HM Treasury, 'Preston Guidance: October 2017' (2017) <https://www.gov.uk/government/publications/preston-guidance-october-2017> accessed 12 August 2020.

[201] Case 79/86 *Hamilton v Whitelock* EU:C:1987:117, Opinion of AG Mischo.

[202] Case 5/88 *Wachauf* EU:C:1989:179, Opinion of AG Jacobs.

students.[203] Cases such as these attract little academic comment, and individually they contribute little to the elaboration of EU law as a whole. Collectively, however, they form part of the discourse between the Court and the governments of the Member States.

3. Preferred answer on a provision or principle of EU law

The UK government took advantage of the opportunity to put forward its preferred interpretation of the principles of EU law from the beginning of the UK's membership and was proactive in doing so in cases originating in the other Member States. An example is the UK's early contributions to cases on services. The UK's forceful submissions in other states' cases on healthcare represent both an attempt to elucidate, and to limit, the principles around free movement in respect of the provision of medical services. In *Pierik*, for instance, the UK government said in its observations:

> [I]f … the regulation were interpreted as requiring the competent institution to accept liability for the cost of providing treatment which is not provided for by the national law of the Member State in question, the scope of those provisions would be distorted since they would have the effect of creating an independent social security law of the Community.[204]

It can be argued that the UK's observations were directed towards discouraging the formation of an EU-wide free market in healthcare and, as de Witte notes, an associated contractual liability of Member States towards their nationally insured citizens.[205]

A similar tension between the constraint, and the elucidation, of free-market provisions characterised the UK government's submissions in respect of other services. An example is *Humbel*, in which the UK argued that general academic education did not (unlike vocational education) constitute the provision of services, and also that the *freedom* to provide services across national borders did not imply an *obligation* to do so.[206]

This dual intention behind the UK's observations means that—like the Court's judgments—they frequently served to provide the UK's preferred answer to a specific legal or policy question and also to comment on an underlying principle. However, this could take the form of an attempt not

[203] Case C-386/04 *Centro di Musicologia Walter Stauffer* EU:C:2005:785, Opinion of AG Stix-Hackl.

[204] Case 117/77 *Pierik* EU:C:1978:72, Report for the Hearing.

[205] Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2015) 115.

[206] Case 263/86 *Humbel* EU:C:1988:151, Opinion of AG Slynn.

just to clarify but to limit the scope of a recognised principle of EU law, to guide what the UK saw as an evolving principle, or to prevent the recognition of a new *general* principle. Thus there was considerable overlap with categories 6, 7 and 8 below.

4. Support for another Member State

There is considerable anecdotal evidence that member-state governments cooperate in their observations, both out of mutual interest and occasionally as quid pro quo for another government's support.[207] As regards the UK specifically, however, there is a disparity between Granger's findings in the late 1990s and the comments of several people interviewed in the course of this research. Granger included detailed questions about intergovernmental cooperation in a questionnaire that she circulated to government lawyers and agents, among others, and was told that the UK engaged in only limited cooperation with the other Member States.[208] Her respondents said that the UK felt that the Court benefited from hearing a diversity of arguments and also that the procedure allowed insufficient time for regular consultation with other governments. This position was not, however, borne out a decade later in an interview with a Cabinet Office lawyer, who mentioned that cooperation was not uncommon and observed that email facilitated the rapid exchange of ideas on upcoming cases.[209] The quid pro quo aspect in respect of the UK is implied by one interviewee's statement to van Stralen that the Netherlands was reluctant to imply in its observations that another Member State was wrong, thus 'you really do not like to get into an argument with your British colleague, if you need him for another political deal in Europe.'[210]

Documentation of intergovernmental cooperation at the Court is not easy to find, even between the UK and Ireland. There is evidence of collaboration in direct actions, both when states

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[207] Marie-Pierre Granger, 'Governments in Luxembourg: How Do Governments Use EU Litigation to Protect National Policies or Influence EU Policy and Law-Making (Paper Presented at ECPR Fifth Pan-European Conference on EU Politics, Porto, 24-26 June 2010)' (2010) <https://www.semanticscholar.org/paper/Paper-1596%3A-Governments-in-Luxembourg%3A-How-Do-Use-Granger/d95b6c5e9d3014db20e65728bc7fc66a5063c42a> accessed 31 July 2020. Interviewees who confirmed such cooperation included a UK Cabinet Office lawyer and German and UK government agents.

[208] Granger, 'The Influence of Member States' Governments on Community Case Law: A Structurationist Perspective on the Influence of EU Governments in and on the Decision-Making Process of the European Court of Justice' (n 76) 507, 406.

[209] Interview with Shasa Bezhadi-Spencer, Joint Head of EU Litigation at Treasury Solicitor's Department (23 July 2014).

[210] Floris van Stralen, 'The Member States and the Court of Justice: Why Do Member States Participate in Preliminary Reference Proceedings?' (MA thesis, University of Gothenburg 2015) 40.

intervene in each other's cases and when they are the subjects of parallel actions.[211] Cooperation in preliminary references is unfortunately hard to detect from the available documentary evidence, not least because it is difficult to distinguish the situation in which a Member State makes observations *in support of* another from a situation in which it merely *agrees with* another as to the answers to the questions referred. Derlén, Lindholm and Naurin have made an interesting attempt to identify Member States which acted as 'allies' in making observations by focusing on specific wording in the Court's judgments that indicates agreement between states.[212] Their study does not, however, distinguish deliberate co-operation from agreement based on common interests.

It can be argued that the UK and Ireland tend to have similar policy preferences and to submit observations based on those rather than on any prior understanding. For example, in *Campus Oil,* the UK argued with Ireland that, while derogations from the principle of the free movement of goods should be construed strictly, they should not be so construed as to have no effect.[213] This principle had the potential for future application to a UK measure, so the observations cannot be interpreted as altruistic. A later and more routine example is *Impact,* where the UK gave the same answer as Ireland to a question relating to Ireland's employment of civil servants on fixed-term contracts. However, there is no internal evidence that this arose from anything other than self-interest.[214] It is notable that, of the 25 questions referred by Irish courts between 1997 and 2008 that were analysed by the University of Gothenburg, the UK gave an answer to 16 but only gave the same answer as Ireland in three. Because the substance of these answers was derived from the summaries of the national positions in the Reports for the Hearing, it is impossible to know if those three answers were expressed in the same terms as those of Ireland. The evidence for the UK acting directly to support Ireland is therefore scant.

5. National constitutional interests

In the absence of a codified constitution, the UK is not unfamiliar with its courts deliberating over matters of the balance of power between its institutions. Thus it could be argued that the Court of

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[211] Granger suggests the *Open Skies* cases as a clear example in which the various government agents are known to have met to agree their lines of argument in advance (Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, *Commission v United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria* and *Germany* EU:C:2002:624-631).

[212] Mattias Derlén, Johan Lindholm and Daniel Naurin, 'You're Gonna Miss Me When I'm Gone! The Impact of Brexit on Member States' Contribution to the Case Law of the CJEU' (2019) 3 Europarättslig Tidskrift 381.

[213] Case 72/83 *Campus Oil* EU:C:1984:256.

[214] Case C-268/06 *Impact* EU:C:2008:223.

Justice's role in setting the parameters of the relationship between the EU's institutions and the Member States offended the UK's sense of constitutional propriety somewhat less than it might, say, Germany's. This is borne out by a comparison of the German Constitutional Court's repeated decisions to the effect that Germany has the ultimate authority to accept or reject the Court's jurisprudence on a case-by-case basis in the *Solange* and *Maastricht* cases,[215] with that of the House of Lords in, for instance, *Factortame (No 2)*.[216] Equally, the UK joined the EU at a time when the principles of direct effect and supremacy were already *faits accomplis*, although much elaboration was yet to follow. Thus, several aspects of the Court's constitutional jurisprudence should have been relatively uncontentious. However, in the absence in the UK of any judicial power of review of primary legislation, such a power invested in a supranational court has been controversial, if perhaps more so (in practice) with the press than with the government. These factors are the main features of the context in which the UK government engaged in cases with constitutional implications.

5.1. Sovereignty, subsidiarity and competence

The supremacy of EU law was recognised, in principle, in s2(1) of the European Communities Act 1972:[217]

> All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties … are without further enactment to be given legal effect [and] recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable EU right' and similar expressions shall be read as referring to one to which this subsection applies.

It could be argued that the words 'available in law' acknowledged that the Treaties did not just confer rights and obligations on states but made rights available to their citizens, and thus that the UK conceded both sovereignty (within the scope of the Treaties) and the direct effect of Treaty articles, from the date of accession.

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[215] Case 11/70 *Internationale Handelsgesellschaft* (*Solange I*) EU:C:1970:114; *Re Wünsche Handelsgesellschaft* (*Solange II*) [1987] 3 CMLR 225; BvR 2134, 2159/92 – *Maastricht*, 12 October 1993 – BverfGE 89, 155.

[216] Case C-221/89 *R v Secretary of State for Transport, ex p Factortame* EU:C:1991:320; Davies (n 93); Neil MacCormick, *Questioning Sovereignty* (OUP 1999) 100.

[217] European Communities Act 1972, s 2. Some limitations to supremacy were introduced in the European Union Act 2011.

The supremacy of EU law rarely operates to disapply primary legislation—via what Dougan describes as its exclusionary effect—but more commonly by substitutional effects: allowing the implementation of EU measures to be challenged in national courts via the principle of direct effect.[218] The UK government was involved in almost all the cases in which the principle of direct effect was elaborated. The three significant exceptions were, as noted earlier, *Ratti*, *Marleasing* and *Mangold*, the importance of which seems to have taken not just the EU litigation unit but all the Member States by surprise.[219]

The UK did not submit observations in perhaps the first major case on supremacy *per se* that occurred after its accession, *Simmenthal*; indeed, only Italy, from which the case originated, did so.[220] *Simmenthal* is another case whose mundane subject-matter appears to have concealed the importance of its legal logic. The next major litigation on supremacy—rather than the scope of direct effect—did not, however, evade notice. This was the *Factortame* litigation on the legality of the Merchant Shipping Act 1988, which sought to restrict the practice of quota-hopping, whereby fishing vessels from other Member States were re-registered in the UK so as to be able to fish against the UK's quota. The associated preliminary references were (in order of referral) on the availability of interim relief, on the (in)compatibility of the Act with EU law and on state liability.[221] The first two references were made in March and May 1989 respectively, and amendments to the Act were debated in Parliament in the following October, before the hearings in 1990 and 1991.[222] It is unclear whether the UK's written observations were made before or after the parliamentary debate, but they were undoubtedly made in full knowledge of the case's constitutional importance. The government also issued a press release that announced the amendments and defended its position—which is mentioned in the judgment—and the proceedings were widely discussed in the press.

Factortame is the most notorious of a small handful of EU cases that have acquired the status of touchstones for the Eurosceptic press and public. A speaker in the parliamentary debate described the amendments made in anticipation of the Court's decision as 'a humiliating and important

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[218] Michael Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy' (2007) 44 Common Market Law Review 931, 932.

[219] Case 148/78 *Ratti* EU:C:1979:110; Case C-106/89 *Marleasing* EU:C:1990:395; Case C-144/04 *Mangold* EU:C:2005:709.

[220] Case 106/77 *Simmenthal* EU:C:1978:49.

[221] Case C-213/89 *R v Secretary of State for Transport, ex p Factortame* EU:C:1990:257; Case C-221/89 *R v Secretary of State for Transport, ex p Factortame* EU:C:1991:320; Joined cases C-46/93 and C-48/93 *Brasserie du pêcheur and R v Secretary of State for Transport, ex p Factortame* EU:C:1996:79.

[222] HC Deb 25 October 1989, vol 158, cols 997-1028.

defeat because it is an historic surrender of some constitutional importance'.[223] *Factortame* has been brought up by name in parliamentary debates on 94 occasions at the date of writing.[224] However, the government's observations in cases with constitutional significance were rarely couched in the same terms as the parliamentary rhetoric on the same topic. An exception was the use of the word 'plundering' in reference to fish stocks, which strayed beyond the style typically adopted even by British barristers at the Court.[225] The emphasis in the UK's observations was on the procedural requirements for an interlocutory injunction and the argument that Member States had the sole right to decide on the registration requirements for ships and on the nationality of legal, as well as natural, persons. When *Factortame (No 2)* returned to the House of Lords, Lord Bridge said in the leading judgment:

> Some public comments on the decision of the European Court of Justice … have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the E.E.C. Treaty … it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary.[226]

This acceptance of supremacy and the attendant loss of sovereignty seems to have been reflected in the UK government's observations as a whole, if not its political pronouncements.

In a small number of cases, the UK put its sovereignty below the aims of the EU, at least by implication. In *Nouvelles Frontières*, for instance, the UK argued in favour of an extension of Single Market rules rather than its own sovereignty.[227]

Nouvelles Frontières also emphasises the vital point that member-state governments do not necessarily agree with each other in their observations. The Netherlands (and the Commission) agreed with the UK that passenger air transport should be brought within the rules of the Single

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[223] Jonathan Aitken, HC Deb 25 October 1989, vol 158, col 1002.

[224] It may also have fuelled the emphasis, in debates on Brexit, on fishing.

[225] Case C-221/89 *R v Secretary of State for Transport, ex p Factortame* EU:C:1991:320, para 4.

[226] *R v Secretary of State for Transport ex p Factortame Ltd (Interim Relief Order)* [1990] UKHL 7 [1].

[227] Joined Cases 209 to 213/84 *Asjes* EU:C:1985:360, Opinion of AG Lenz.

Market, and the Italian and French Governments took the opposite view, even though all had national airlines that would be affected.

The issues of competence and subsidiarity have been raised in preliminary references at a steady but low frequency. The question of where competence lies to determine the division of decision-making between the EU institutions and Member States (*Kompetenz-Kompetenz*) is an unresolved problem. It has been discussed more widely in academic circles than raised in case law, but the Court's settled position is that it alone determines this. No preliminary reference from a court in the UK concerned *Kompetenz-Kompetenz* and the UK government seems not to have addressed the issue in any observations.

The principle of subsidiarity was explicitly introduced in the Maastricht Treaty. It was a primary issue in only five cases to the end of 2013: *Bosman, Imperial Tobacco, BAT, Alliance for Natural Health* and *Vodafone*.[228] Apart from *Bosman*, in which the UK government did not submit observations, each was referred by a UK court, and the UK government's position was either to support the basis under which the EU measure had been adopted or to argue that the principle of subsidiarity was not breached in that instance. After the introduction of the Impact Assessment framework for assessing subsidiarity in the Lisbon Treaty, the UK did not participate in any relevant cases. Thus, at least on the evidence of its observations, it can be argued that the UK did not feel the principle of subsidiarity to have been threatened.

5.2. The national balance of power

As noted in the previous chapter, Börzel and Risse suggest that Europeanisation not only has the potential to change the balance of power between the EU and a Member State, but ultimately between the state's institutions.[229] It can be argued that the Court of Justice provides one route to such changes. The preliminary reference procedure empowers lower courts against higher courts and national judiciaries against the legislature; it also has the potential to alter the balance of

[228] Case C-415/93 *Bosman* EU:C:1995:463; Case C-74/99 *Imperial Tobacco* EU:C:2000:547; Case C-491/01 *BAT* EU:C:2002:741; Case C-154/04 *Alliance for Natural Health* EU:C:2005:449; Case C-58/08 *Vodafone* EU:C:2010:321.

[229] Tanja A Börzel and Thomas Risse, 'When Europe Hits Home: Europeanization and Domestic Change' (*EIOP European Integration Online Papers*, 2000) 10 <http://eiop.or.at/eiop/texte/2000-015a.htm> accessed 10 August 2020.

power between the government and civil society organisations, trades unions and federal administrations. [230]

Several authors have suggested that the preliminary reference procedure empowers the judiciary against the executive.[231] In the UK, where the courts have almost no power to review primary legislation, this would imply that the procedure offered the courts the opportunity to make references that were motivated by a desire to overstep this constitutional restriction. Broberg and Fenger, however, comment that it is 'virtually impossible to prove or disprove' whether national courts are motivated by something other a desire to see EU law properly applied.[232] It could be argued that the UK's submissions in the *Factortame* cases represented an attempt to fend off such a route to supranational judicial review, but such an interpretation is difficult to derive from the content of the observations. Instead, an analogy may be drawn with the courts' execution of their duties under the Human Rights Act, whereby they steer carefully clear of trespassing upon the powers of Parliament.

The Court may also empower, for instance, pressure groups and individuals at the expense of their governments.[233] Governments may, therefore, submit observations against interest groups and lobbying organisations—even those set up by statute. For example, Barnard, and Alter and Vargas, draw attention to a series of cases on gender equality supported (and in one case brought) by the UK's Equal Opportunities Commission.[234] The UK government submitted observations broadly countering the EOC's position in all eighteen cases that the latter supported.

One aspect of the internal balance of power upon which EU law might bear is the relationship between regional bodies with law-making capacity and their central governments. Such arrangements produce an anomaly, in that regional bodies may be responsible for implementing

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[230] Karen J Alter, 'The European Court's Political Power: The Emergence of an Authoritative International Court in the European Union', *The European Court's Political Power: Selected Essays* (OUP 2009) 100–102.

[231] Among others, Alec Stone Sweet and Thomas L Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) 92 American Political Science Review 63, 66; Alter (n 230) 104; Marlene Wind, Dorte Sindbjerg Martinsen and Gabriel Pons Rotger, 'The Uneven Legal Push for Europe: Questioning Variation When National Courts Go to Europe' (2009) 10 European Union Politics 63, 72. .

[232] Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (OUP 2014) 54.

[233] Börzel and Risse (n 229).

[234] In one case by the Equal Opportunities Commission of Northern Ireland. Catherine Barnard, 'A European Litigation Strategy: The Case of the Equal Opportunities Commission' in Jo Shaw and Gillian More (eds), *New legal dynamics of European Union* (OUP 1995); Karen J Alter and Jeanette Vargas, 'Explaining Variation in the Use of European Litigation Strategies' (2000) 33 Comparative Political Studies 452.

EU law, including decisions of the Court, but they have no power to put forward legal arguments if their implementation is challenged. In the UK this imbalance was manifest in the absence of an opportunity for the devolved administrations to make their own submissions in preliminary reference cases. Although the courts of Scotland and Northern Ireland could and did refer questions to the Court of Justice, the administrations lacked direct access to the Court. Such access was one of several demands made by a group representing Europe's regions in the run-up to the Maastricht Treaty, but on this point, the Member States held fast.[235] The devolved administrations, therefore, were instructed on the method of implementing EU Directives by central government,[236] but were unable to take a direct role in presenting legal arguments to the Court and could bear the costs if penalties resulted.[237] The administrations were, however, required to help prepare the UK government's submissions. The Memorandum of Understanding with the devolved administrations says:

> Where a case partly or wholly involving implementation by a devolved administration is referred to the European Court of Justice, the devolved administration will contribute to the preparation of the UK's submissions to the Court. The devolved administration would take the lead in doing so for cases wholly concerned with implementation in relation to a matter falling within its responsibility, agreed as appropriate with the relevant Whitehall departments. The Cabinet Office and the Treasury Solicitor's Department will co-ordinate the UK's submissions to the Court.[238]

In this sense, the devolved administrations were treated like government departments.

It could be argued that Scotland has, in practice, not been seriously deprived of the opportunity to make submissions in its own cases. Rodger identified five referrals from Scottish courts between

[235] W John Hopkins, 'A Tale of Two Europes: European Regions from Berlin to Lisbon' (2010) 2 Australian and New Zealand Journal of European Studies 55.

[236] Department for Business Energy and Industrial Strategy, 'Transposition Guide: How to Implement European Directives Effectively' (2013) <https://www.gov.uk/government/publications/implementing-eu-directives-into-uk-law> accessed 20 July 2020.

[237] Cabinet Office, 'The Cabinet Manual. A Guide to Laws, Conventions and Rules on the Operation of Government' (2011) para 9.17.

[238] Cabinet Office, 'Devolution: Memorandum of Understanding and Supplementary Agreements: Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee' (Cmd 7864, 2013) para B4.25.

devolution in 1999 and the end of 2013, in four of which the UK submitted observations.[239] Three concerned VAT and the Scottish government was not concerned as such, but two agricultural cases—*Booker Aquaculture* and *Feakins*—named the Scottish Ministers as defendants.[240] In the first, both the UK government, and the Scottish Ministers as defendants, made submissions in agreement with each other (and the other intervening Member States); in the second only the Scottish Ministers made a submission. Thus the Scottish administration was able to defend its position directly because it had been named as a party.[241]

The extent to which observations prepared by the Scottish administration are adopted unchanged by the European litigation unit is unknown. However, in one case of which I am aware, observations were prepared by the Scottish government for a preliminary reference by the Court of Session that was subsequently withdrawn. The UK government then used the brief as the basis of its submission in a related English case in the same year.[242]

5.3. Balance of power between the UK and the Court of Justice

A Member State's attempts to influence the balance of power may arise solely in the context of an individual case or, alternatively, may amount to a course of conduct that challenges the power of the Court more generally. In an individual case, the Member State may seek to question the Court's power to adjudicate on the questions referred: this usually takes the form of arguing that a question can be solved entirely on the basis of national law or that it refers to a matter that is outside the scope of EU law. For example, in *ICI*, the UK government argued that any judgment the Court delivered on a question referred by the House of Lords would have no bearing on the outcome of the national case. The Court of Justice noted that the House of Lords felt that the disputed national provision could bear another interpretation than that mentioned by the UK government, in which circumstance the Court's answer would be relevant, and that it was solely for the national court to decide if the Court's answer was necessary for it to decide the case. The

[239] Barry Rodger, 'The Application of EU Law by the Scottish Courts: An Analysis of Case-Law Trends over 40 Years' [2017] The Juridical Review 1, 10.

[240] Joined Cases C-20/00 and C-64/00 *Booker Aquaculture* EU:C:2003:397; Case C-335/13 *Feakins* EU:C:2014:2343.

[241] This list is, however, not exclusive, as a case that started in a Scottish court could result in a reference from the Supreme Court: see e.g. Case C-394/96 *Brown v Rentokil* EU:C:1998:331, which started in a Scottish employment tribunal and went to the Supreme Court via the Employment Appeal Tribunal and the Court of Session.

[242] Interview with barrister who prepared UK submission, 4 January 2015; Case C-44/12 *Kulikauskas v Macduff Shellfish* EU:C:2012:728 ; Case C-167/12 *CD v ST* EU:C:2014:169.

question was, therefore, admissible.[243]

Such attempts are tied to the specific facts of a case. A more general course of conduct can be detected in states' repeated attempts to get the Court of Justice to reopen oral hearings. This possibility was discussed in Chapter 2, where it was noted that although in principle, an interested party may request that the oral hearing be reopened, such a request has never succeeded.[244] The UK requested the reopening of the oral procedure in *Alabaster* because, it claimed, the Advocate General's Opinion took an extraneous matter into account, but this was dismissed via the usual formula.[245] Such demands arise from the circumstances of each particular case, but the success of any one attempt would represent a considerable change in the balance of power between intervening governments and the Court.

6. Economic and political/policy preferences

Granger observes that the UK, with its common-law recognition of the importance of case law, saw the Court of Justice as a forum for promoting its economic and political interests from the beginning of its membership.[246] It did so more frequently and consistently than the other 1973 states, despite—to a large extent—sharing their economic interests and political concerns. It will be argued in the next chapter that the UK might have used interventions in court proceedings as a second chance to make arguments that had failed at Council level. Although the UK abstained or voted against the majority in Council more often than, say, Ireland, it was still relatively rare for it to do so. This was chiefly because about 70% of Council business is settled in working parties and 'corridor bargaining', such that no Member States *routinely* vote against the majority in the Council. As a result, the observations the UK submitted to the Court may be a better guide to government policy than its voting record in the Council. An exception is if an issue came up simultaneously in both Court and Council. Then the EU litigation unit took into account whether the government's line was felt to be likely to succeed in the Council and could decide that there was nothing to be gained by repeating the argument at Court level.[247]

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[243] Case C-264/96 *ICI* EU:C:1998:370 paras 14-17.

[244] Article 83 of Consolidated Version of the Rules of Procedure of the Court of Justice of 25 September 2012.

[245] Case C-147/02 *Alabaster* EU:C:2004:192.

[246] Granger, 'When Governments Go to Luxembourg... the Influence of Governments on the Court of Justice' (n 26) 13.

[247] Meeting with joint head of EU litigation unit 23rd July 2014.

As noted in the section on Denmark, the salience of an issue in a Member State is not always reflected in the likelihood of its government submitting observations in a case concerning that issue, whether or not there are ongoing Council negotiations. It can be suggested that this may indicate the difficulty of presenting an economic or policy argument within the confines of the internal logic of EU law. A Member State with fewer resources, or less willingness to participate in the mechanisms of EU law, is less likely to try to send what Pollak calls 'political signals'.[248] The UK government, with its more frequent interventions, gave itself more opportunity to send political signals to the EU via the Court of Justice, even if these were couched purely in legal terms.

Such signals may directly concern the subject of a case or may concern an issue that was not raised in the questions referred: as such, this category overlaps with number 3 above, but is intended to cover issues that are broader than direct challenges to EU legal provisions. In *Pringle*, for instance, although the case hinged on whether there had been improper use of the simplified revision procedure, the UK wanted to emphasise that the procedure could be used for reducing EU competences, but not increasing them.[249] In other words, a rather technical question was appropriated in order to respond to the potential political issues it raised.

Political signals may be negative. Slagter suggests that the UK 'might submit written observations in an attempt not to upload their own policies per se, but rather to prevent more adverse policies from gaining traction via the Court's rulings.' She argues that the UK was more likely to intervene when it perceived a potential policy to be 'particularly burdensome' and gives the example of *Vroege*, the case which led to *Preston* (mentioned in section 1).[250]

The UK showed several consistent policy preferences during its membership, both positive (e.g. the Single Market) and more negative (e.g. the Common Agricultural Policy). Some examples of cases where the UK's submissions express its support for the Single Market are mentioned in the section on guiding the evolution of EU law. Some of the UK's preferences were shared with Denmark or Ireland: in particular, strong preferences about citizenship and family reunification:

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[248] Mark A Pollack, 'Learning from EU Law Stories: The European Court and Its Interlocutors Revisited' in Fernanda G Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (CUP 2017) 577.

[249] Case C-370/12 *Pringle* EU:C:2012:756

[250] Tracy Hoffmann Slagter, 'Uploading to the Court? Examining Member State Influence on ECJ Social Policy Decisions' (Paper prepared for presentation at the Annual Meeting of the Western Political Science Association, Portland, Oregon, 23-25 March 2012) 21; Case C-57/93 *Vroege v NCIV* EU:C:1994:352; Case C-78/98 *Preston* EU:C:2000:247.

the UK submitted observations in 44% of cases. The UK was broadly unsuccessful in swaying the Court in cases such as *Zhu and Chen* (the UK's observations in which are recounted by Kochenov and Lindeboom)[251], *Baumbast* and *Metock*.[252] It can be argued that the UK's observations represented a failed attempt to stem the incremental, 'stone-by-stone' development of EU citizenship law described by Lenaerts.[253]

The UK also had strong policy preferences that were less likely to be expressed through the Court. For instance, despite political criticism of the Common Agricultural Policy (CAP) by all UK governments, the UK made submissions in only 11.5% of the cases on agriculture, about half of which were cases referred by UK courts. It could be argued in this case that disapproval of the principles and distributive effects of the CAP was a matter of 'high politics' whereas agricultural issues that reach the Court are mostly matters of 'low politics' that do not offer any opportunity to influence EU policy. In the early days of its membership, most of the cases in which the UK submitted observations could be described as explorations of the rules: cases on the common organisation of various agricultural markets, customs tariffs and pricing. Nearly a fifth of the cases in which the UK intervened concerned some aspect of the fishing industry (although these included the *Factortame* cases which were of undoubted wider significance). After 2000 the UK made very few observations in agriculture cases, with five years in which it made none at all. This suggests a simple pattern: of an area of EU law having been explained to the satisfaction of the UK government and courts, perhaps combined with a fall in the amount of secondary legislation that required interpretation.

Other policy concerns may vary in prominence over time and between different governments; the variation in observations according to the contemporaneous political and social context would make an interesting study that is sadly outside the scope of this thesis. In this respect, it is worth noting that the head of the EU litigation unit stated that, although there was occasionally a 'big thrust' from the UK on a particular topic, usually there was no planned theme to UK involvement.[254] To a large degree, this must be a consequence of the need for circumstances to

[251] Dimitry Kochenov and Justin Lindeboom, 'Breaking Chinese Law – Making European One' in Fernanda G Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (CUP 2017).

[252] Case C-413/99 *Baumbast* EU:C:2002:493; Case C-200/02 *Zhu and Chen* EU:C:2004:639; Case C-127/08 *Metock* EU:C:2008:449.

[253] Lenaerts (n 161).

[254] Interview with Shasa Bezhadi-Spencer, Joint Head of EU Litigation at Treasury Solicitor's Department (23 July 2014).

come together to allow broader considerations of policy to be brought before the Court of Justice: typically either a direct action by the Commission or a referral from a national court.

7. Clarifying EU law

The UK plainly had several non-altruistic motives for attempting to influence the Court in its role in clarifying EU law, both at the level of individual pieces of legislation and in terms of the development of large areas of the law. Arabadjiev observes, however, that the UK was one of the Member States that, in some cases, 'act as unbiased counsel to the Court, assisting us in clarifying questions of common interest.' He gives, as an example, the UK's submission in *CD*, which, he says, 'sought not only to defend its national legislation and practices which were being challenged but also to assist the Court on a controversial matter of high interest to the society at large.'[255] The UK being at the time one of the few Member States in which surrogacy was regulated, its observations gave a detailed account of the reasoning behind its measures as well as, Arabadjiev says, 'adding new perspectives into the discussion.'[256] Granger similarly mentions that the UK government lawyers saw their role as both to defend national interests and to give disinterested advice.[257]

Attention can be drawn to several instances of the UK making submissions that did not favour a national company or that criticised its legislation. Examples include *Skills*,[258] in which the UK argued in favour of stricter interpretation of tachograph rules and contrary to the UK company that was the defendant, and *Thames Water*, in which the UK government's observations drew attention to a lacuna in the Waste Water Directive.[259]

Nouvelles Frontières, mentioned under several headings here, demonstrates the difficulty of drawing a hard line between the clarification of the law and attempts to guide its evolution—a conundrum that is the basis of much criticism of the supposed activism of the Court of Justice—and therefore between cases that fall into the area where law and policies overlap. The UK's observations in *Nouvelles Frontières* concerned the clarification of a legal issue (including the

[255] Case C-167/12 *CD v ST* EU:C:2014:169; Alexander Arabadjiev, 'Influencing Luxembourg : UK Interventions in Preliminary Ruling Proceedings' 8.

[256] Arabadjiev (n 255) 9.

[257] Granger, 'When Governments Go to Luxembourg... the Influence of Governments on the Court of Justice' (n 86) 8.

[258] Case C-297/99 *Skills Motor Coaches* EU:C:2001:37.

[259] Case C-252/05 *Thames Water Utilities* EU:C:2007:276.

significance of a previous judgment of the Court) but also made a more normative argument for widening the scope of the Single Market.

8. Guiding the evolution of EU law

There is abundant evidence of the UK attempting to influence the evolution of EU law, not just from the existence of an EU litigation unit that was organised so as to respond to cases referred by the courts of other Member States but discernible in the distribution of the UK's observations. This motive was also freely acknowledged: for instance, Granger was told by the then head of the EU litigation unit that 'It is the policy of the United Kingdom to take an active part in proceedings. It is thought that the direction of case law can be best influenced by good quality arguments presented by Member States .'[260] This influence was frequently but not exclusively expressed in terms of limiting the scope of EU law, particularly in cases to do with citizenship and immigration (see Table 8).

One area, however, where the UK expended particular effort and sought to expand the scope of EU law was the Single Market. The UK government was a strong promoter of the Single Market, both through diplomatic efforts and via the Court. As Geddes observes, governments of all persuasions saw the Single Market aspect of European integration as a key argument for British membership of the EU from the 1980s onwards.[261] The House of Lords European Union Committee, reporting in 2014 on the financial crisis, said that 'The UK remains committed to maintaining the integrity and operation of the single market and will work to ensure that this is upheld.'[262]

At the Court, the UK was the second most frequent intervener in cases on three out of the four freedoms: to France in cases on the free movement of goods and to Germany in cases on workers and capital. It was equal fourth in cases on services, where Germany also came first. The UK was, however, the state that made the most observations in cases on Single Market issues *from other Member States*. In percentage terms, the UK's observations in all free movement cases show two peaks: in the late 1970s and a broader peak in the 1990s and early 2000s; this is true for all four freedoms. The peak percentages vary by subject: for instance, in the decade to 2000, the UK made observations in an average of 26% of cases on the free movement of goods, 29% of

[260] Granger, 'The Influence of Member States' Governments on Community Case Law: A Structurationist Perspective on the Influence of EU Governments in and on the Decision-Making Process of the European Court of Justice' (n 76) 405.

[261] Andrew Geddes, *Britain and the European Union* (Palgrave Macmillan 2013) 158-165.

[262] European Union Committee of the House of Lords, 'Euro Area Crisis : An Update' (2014) 37.

cases on services and establishment, 39% of cases of the freedom of movement and 20% of cases on capital (Figure 20). It is important to stress that the figure indicates the likelihood of the UK submitting observations on a given topic as a percentage of such cases, rather than absolute numbers: for instance, in 1978 the UK submitted observations in 16.8% of 24 cases on goods, 20% of 5 on services and establishment, 66.7% of 3 on workers and in the single case of free movement of capital.

The fact that the pattern is similar for each topic suggests that there should be a systematic explanation. It can be argued that the late 1970s represent a period when the UK was coming to terms with membership of the Common Market and wishing to assert influence over the details of its operation. The late 1990s and 2000s offered similar opportunities concerning the details of the Single Market. A detailed examination of the political circumstances prevailing at given times during the UK's membership would no doubt yield useful insights but is outside the scope of this work. The decline in observations after the mid-2000s holds across all the subjects, despite the steady rise in cases on services and capital, and was not unique to the UK: Derlén, Lindholm and Naurin found that it was true across all Member States.[263] It was, however, particularly marked in the UK; Derlén et al. suggest that the ever-increasing number of references led the government to become more strategic in which cases it chose to devote resources.[264] Certainly there were concerns expressed about the number of cases reaching the Court in this period.[265]

[263] Mattias Derlén, Johan Lindholm and Daniel Naurin, 'You're Gonna Miss Me When I'm Gone! The Impact of Brexit on Member States' Contribution to the Case Law of the CJEU' (2019) 3 Europarättslig Tidskrift 381, 384.

[264] Derlén, Lindholm and Naurin (n 212) 386.

[265] House of Lords European Union Committee, 'European Union Committee - Fourteenth Report: The Workload of the Court of Justice of the European Union HL Paper 128' (2011); House of Lords European Union Committee, 'Workload of the Court of Justice of the European Union: Follow-Up Report HL Paper 163' (2013).

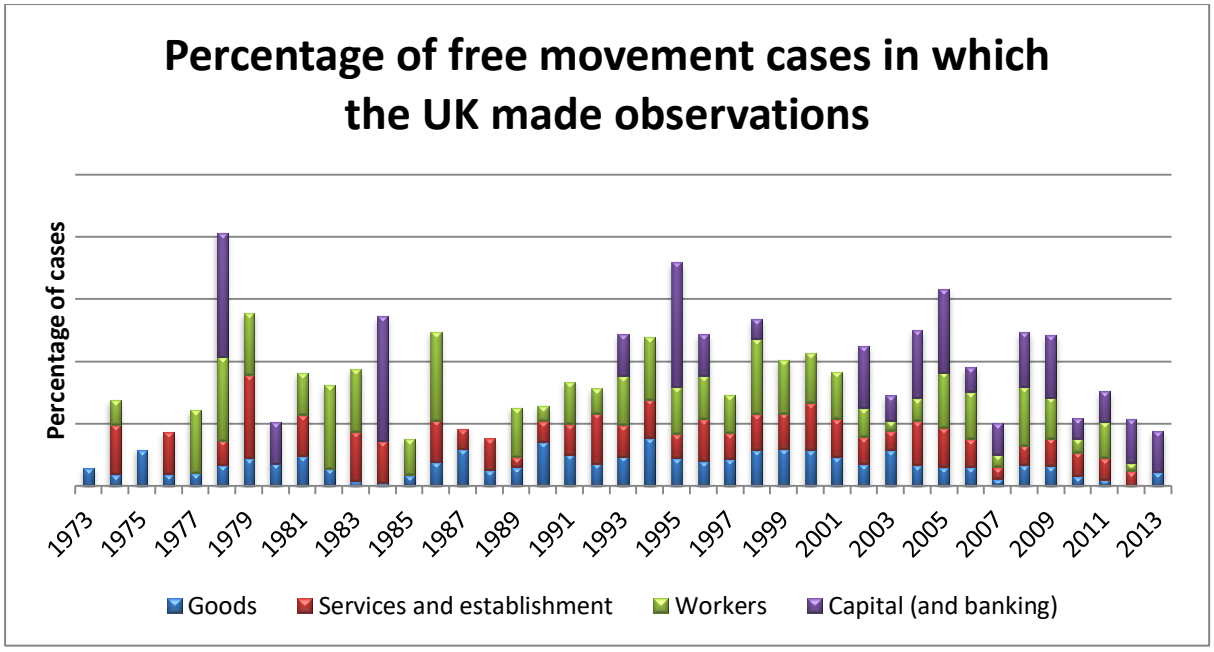

Figure 20: Percentage of free movement cases in which the UK made observations

There are clear examples of the UK making observations that supported the functioning of the internal market over national procedures and interests, several of which predate the Single European Act. An early example is *Reyners*, where the UK argued that limitations on the free movement of legal services for lawyers should be interpreted restrictively. The contemporaneous case of *Dassonville*, where the UK argued for the legitimacy of Belgian measures that the Court found were equivalent to a quantitative restriction, could be regarded as a counterexample, inspired by a perceived need to protect a national industry.[266] Some key cases, such as *Cassis de Dijon* and *Trailers*, were perhaps overlooked at the time, although as Nicolaïdis recounts, *Cassis de Dijon* went on be an inspiration to Lord Cockfield in his efforts towards the completion of the Single Market.[267] Its realisation has generally been treated—by British parliamentarians at least—as a success of the UK government.[268]

The UK also supported the legal basis on which internal market measures were adopted, where this was challenged, for instance in the combined direct action and preliminary reference cases on

[266] Case 2/74 *Reyners* EU:C:1974:68, Case 8/74 *Dassonville* EU:C:1974:82.

[267] Case 120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42; Case C-110/05 *Commission v Italy (Trailers)* EU:C:2009:66; Kalypso Nicolaïdis, 'The Cassis Legacy: Kir, Banks, Plumbers, Drugs, Criminals and Refugees' in Fernanda G Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (CUP 2017).

[268] E.g. in 1992 the Conservative minister Lynda Chalker said '[L]et us not forget the achievements which many planned, especially my noble friend Lord Cockfield. In the past few weeks the Community has delivered the very internal market measures for which he worked so long and hard.' (HL Deb 2 July 1992, vol 538, col 886).

tobacco advertising. In this case, the tobacco companies (and Germany) argued that rules on tobacco advertising were adopted for public health purposes rather than for the furtherance of the Single Market. The UK government, however, argued that 'it is perfectly possible for a measure to pursue, indissociably, aims related to the internal market and aims related to a Community policy.'[269] It could be argued that the UK's analysis showed that it was willing to countenance some 'mission creep' in the development of the scope of the internal market.

As was noted in Chapter 5, the UK's observations in *Nouvelles Frontières*—which were in favour of the application of the general principles of EU law, including the competition rules, to the air transport industry—could be argued to constitute an attempt to guide the evolution of EU law. Whether the UK's motive was disinterested was debatable: such support for an extension of the Single Market would come at the theoretical expense of the UK's sovereignty, but would also benefit the British airline industry.[270] Nevertheless, the UK's contribution was phrased in evolutionary terms, including the observation that 'it would be unacceptable nearly 30 years after the entry into force of the EEC Treaty for this sector to continue to be excluded from the scope of the competition rules.'[271]

9. Political benefits from participation

The political benefits that might have accrued to the UK government from participation at the Court have to be seen in the global and European frameworks, as well as in a purely national context. It can be contended, not least from international reactions to Brexit, that the UK stood to lose international standing from leaving the EU. This implies that, from an external viewpoint, its standing was boosted by membership. It is not obvious, however, that this was consistently the understanding of the UK government. It can be argued that, in its early years of membership, the government appears to have regarded membership as an economic necessity but felt that the development of the EU as a political body would weaken the UK's international status.[272] More recently, the UK's Foreign and Commonwealth Office acknowledged the importance of the EU

[269] Case C-74/99 *Imperial Tobacco* EU:C:2000:547, Report for the Hearing 15; Case C-376/98 *Germany v Parliament and Council* EU:C:2000:544.

[270] Joined Cases 209 to 213/84 *Asjes* EU:C:1986:188.

[271] Joined Cases 209 to 213/84 *Asjes* EU:C:1985:360, Opinion of AG Lenz.

[272] See e.g. ex-Foreign Secretary Robin Cook's autobiography: Robin Cook, *The Point of Departure* (Simon & Schuster 2003) 132.

to the UK's status: in a 2016 speech, the then Foreign Secretary Philip Hammond said, 'our global influence is enhanced by being a leading member of the world's largest trading bloc.'[273]

It is difficult to find evidence that participating in the Court as such affected the UK's global prestige, or that the UK government expected it to. Participation was mainly seen in utilitarian terms rather than in terms of political benefits: for instance, the member of the Treasury Solicitor's Department quoted above stated that it was 'the policy of the UK to take an active part in proceedings before the Court of Justice' but expressed this only in terms of government concerns about the Court's legal developments.[274]

The UK's prestige *within* the EU varied over the years and is a complex topic that is outside the scope of this discussion. However, the effect of participation in court proceedings on the UK's reputation among other Member States could be argued to have been relatively positive, at least in legal circles: Arabadjiev observes that 'regardless of whether I have agreed or disagreed with the arguments put forward by the government of the United Kingdom, they traditionally stand out for their high quality, coherence and critical edge.'[275] The UK's participation may also have compensated somewhat for the loss of soft power and exclusion from informal networks that Lindahl argues that the UK suffered by its exclusion from the Euro. [276] As Zielonka points out, the UK 'always underlined its right to be part of European economic governance' despite choosing to stay outside the eurozone.[277] The UK's observations in *Pringle*, on the European Stability Mechanism, are a notable example of the UK asserting itself in a case that directly concerned the euro area.[278]

Unlike with Denmark and Ireland, it is difficult to determine if the UK gained any domestic political advantage from its participation at the Court of Justice. Media reporting of EU affairs was inconsistent and rarely focused on Court proceedings; instead, it could be argued that the government of the day frequently perceived its domestic reputation to be bolstered by being seen to be in conflict with the EU at an intergovernmental level, although this varied over time.

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[273] Philip Hammond, 'Alternatives to EU membership' (speech at Chatham House 2 March 2016) <https://www.gov.uk/government/speeches/alternatives-to-eu-membership> accessed 21 December 2017.

[274] John Collins, 'Representation of a Member State before the Court of Justice of the European Communities : Practice in the United Kingdom' (2002) 27 European Law Review 359.

[275] Arabadjiev (n 255) 1.

[276] Naurin and Lindahl (n 5).

[277] Jan Zielonka, 'The International System in Europe: Westphalian Anarchy or Medieval Chaos?' (2013) 35 Journal of European Integration 1, 11.

[278] Case C-370/12 *Pringle* EU:C:2012:756.

Certain cases came to form part of a narrative of national loss of sovereignty to the EU, notably *Factortame* and the domestic case of *Thoburn*, but the UK government's efforts at the Court in these cases were rarely discussed.[279] More generally, cases of interest at the Court of Justice were reported, usually briefly, in several broadsheet newspapers and occasionally in more popular publications. Sporadic instances can be found of discussion of the government's position and of the arguments likely to be put before the Court; a fairly recent example is *Watson*, a 2015 case on the UK's Data Retention and Investigatory Powers Act, which was discussed in several newspapers.[280] In general, however, thoughtful discussion of cases that were underway was sufficiently rare that it could be argued that the government was unlikely to gain any public recognition for its submissions. Discussion of cases in trade journals has not been examined, but it seems likely that particular sectors of industry may have been more appreciative—being better informed of the arguments—of the government's participation in the Court.

10. The health of the EU legal order

The UK's degree of involvement in proceedings at the Court—particularly in other states' cases—might be argued to imply that it had an interest, in both senses, in the EU legal order beyond its support, noted above, for the Single Market. In the UK's case, there is some evidence in its observations that its motivations included a desire to promote the health of the EU legal order: for instance, in *Courage* the UK said, 'the underlying rationale … should be the increased effectiveness of enforcement of Community law.'[281]

This category could be argued to include the situation where the UK's observations were intended to facilitate the Court's proceedings. Several interviewees emphasised that the UK has, at least historically, often made observations that were purely designed to clarify the issues raised in an order for reference. [282] They felt that the UK's observations were particularly helpful where the parties gave conflicting accounts of the legal issues or where the national court sent questions that only referred to the facts of the case without identifying the legal issues at all. They noted

[279] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).

[280] Case C-698/15 *Watson* EU:C:2016:70; Owen Bowcott, 'European Court to Consider Legality of UK Surveillance Laws' (The Guardian, 11 April 2016) <https://www.theguardian.com/world/2016/apr/11/european-court-to-consider-legality-of-uk-surveillance-laws> accessed 12 August 2020; Fiona Hamilton, 'Snoopers' Charter Challenged in Europe' The Times (London, 20 July 2016) <https://www.thetimes.co.uk/article/european-court-raises-doubts-over-snoopers-charter-zfd28rbtd> accessed 12 July 2020.

[281] Case C-453/99 *Courage v Crehan* EU:C:2001:465 (Report for the Hearing).

[282] A retired Advocate General, a long-serving legal agent of the UK government and a senior civil servant in the Cabinet Office.

that the UK extended this 'help' to the Court not just in British cases, but in other states' cases in which unclear information was received from national courts.

The University of Gothenburg's analysis of the UK's suggested answers to questions referred to the Court from 1998-2008 found that the UK supported control over issues at the EU level in a lower percentage of questions than either Denmark and Ireland. The UK supported control at the EU level in 24% of its 1,270 answers and supported member-state autonomy in 36%. In 16% of questions, the UK's suggested answer was too complex to classify in this fashion, the remainder being questions where there was no obvious implication for the balance of power between the EU and the Member States. While this approach characterises the UK as having been more anti-communautaire than Denmark or Ireland, a quarter of suggested answers were nevertheless in favour of EU-level control and a further 16% not clearly against. Thus it can be argued that the UK's contributions were at least not consistently contrary to the health of the EU legal order.

Using a Member State's compliance with EU law, as measured by the number of direct actions against it, as a proxy for its support for the legal order, produces a similarly unclear picture. The UK had 53 open infringement actions at the end of the period studied here: more than Denmark (30) and Ireland (34) but half the number of Italy despite the UK having a slightly larger economy. It can be argued that a country's compliance is more a product of its administrative arrangements and capacity than of its disposition towards EU control.

The scale of the UK government's participation in the preliminary reference procedure can be argued to have been both a product of its administrative arrangements and a guardedly proactive and constructive approach to EU law on the part of the government's legal service and the national courts. The UK's dialogue with EU law via the Court was comprehensive in terms of subject-matter and motives.

Conclusion

Analysis of the contributions of all three Member States suggests that those theoretical models which assert that governments are purely motivated to constrain the Court's decision-making are inadequate because they fail to take into account both the complexities of the interactions between governments and the Court and the legal context in which they take place. The concluding chapter will argue that this analysis demonstrates that a satisfactory model of interactions between governments and the Court must account for all of these motives, for the

disparity in how compelling different Member States find them, and for the variance in Member States' engagement with the Court over time.

Chapter 7: Governments at the Court and Council

Introduction

This thesis has so far highlighted the use that the Member States make of intervening in proceedings at the Court to express, and possibly impose, their policy preferences. The Court is, of course, one of a variety of routes by which governments attempt to influence the EU. Apart from Member States' participation in the intergovernmental conferences that decide on treaty changes, the highest level at which states can convey their policy preferences is the European Council, where heads of state are involved in setting the policy agenda of the European Union. More routinely, the ministers of the member-state governments express their national preferences in the various formations of the Council of the European Union—or more precisely, these preferences are expressed mainly during the preparatory stages of the Council's proceedings, which involve multiple institutions. It can be argued that Member States' participation in cases at the Court is not entirely separate from this legislative activity but is part of a continuum of communication between the EU and the governments of its Member States. Despite the difficulty of discovering the content of Member States' submissions, it can be argued that they may be a better reflection of national policy preferences than Member States' votes in the Council.

This chapter has two aims. The first is to assess the submission of legal arguments to the Court of Justice with reference to two models that together provide helpful frameworks for describing Member States' motives in making submissions and how the Court receives those submissions. The second, which will expand some aspects of the first, will consider the relationship between member-state governments' submissions to the Court of Justice and the positions that Member States express in the setting of the Council of the European Union.

Models

There have been attempts in several academic fields to provide a formal framework for the discussion of communication between the Member States and the EU. The substance of these attempts often depends on an author's view of the vexed question of what the EU is: an intergovernmental international organisation, a confederation, a federal quasi-state or a system of multilevel governance (among others), and upon the academic preferences they bring to their analysis. Scholars of international relations are likely to construct a different model from constitutionalists or lawyers.

The models set out here do not depend heavily on the assumptions of a particular academic sub-discipline; instead, it can be argued that they clarify—and to some extent reconcile—many of the competing models. The two models can be described as the 'zone of discretion' model and the 'continuous discourse' model.[1] It should be stressed that these models are not competing alternatives but two useful ways of thinking about the process of making observations, one mainly concentrating on the *reception* of observations and the other on the *flow of information* between the Member States and the EU. The continuous discourse model is further broken down into two different ways in which the flow of information can be characterised: as a manifestation of Voice or in terms of a bidirectional process of 'uploading' and 'downloading' policies and preferences between the Member States and the European Union.[2]

The zone of discretion model

In simple terms, the first model visualises the Court as operating within a strategic environment in which it gains its powers from the Treaties and the accumulated *acquis communautaire*. The Court's powers are, however, lessened by the opposing powers that non-judicial authorities have to counteract them. This counteraction may consist of non-compliance by individual Member States, of legislative reversal of the Court's decisions or, more probably, of implied threats to do either of these. The deliberate exercise of any of these powers by the Member States can be argued to be political in intention.[3] Such constraints on the Court's powers may be pictured as a theoretical boundary, beyond which external political considerations curtail the Court's actions but within which is the Court is free to act as it thinks fit from a political standpoint. The influence of the Member States on the area within this 'zone of discretion' can only operate on the Court's *legal* reasoning and must comply with legal rules.[4] The boundary can be moved—

[1] Alternatively the 'area of acceptable latitude'(Geoffrey Garrett and Barry Weingast, 'Interests, and Institutions: Constructing the EC's Internal Market' in Judith Goldstein and Robert Keohane (eds), *Ideas and Foreign Policy* (Cornell University Press 1993)) or the 'outer limits of the range of politically feasible Court decisions' Olof Larsson, 'Minoritarian Activism: Judicial Politics in the European Union' (PhD Thesis, University of Gothenburg 2015) 25, paraphrasing Joseph Weiler, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403).

[2] See e.g. Markus Jachtenfuchs and Christiane Kraft Kasack, 'Balancing Unity and Diversity: Exit and Voice in the EU and in Federal Systems (13th Biennial Conference of the EUSA, Baltimore, May 9-11)' and Tanja A Börzel, 'Member State Responses to Europeanization' (2002) 40 JCMS 193.

[3] The preceding chapters make it clear that non-compliance may be down to organisational failures rather than political pressure.

[4] Alec Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes' (2009) 16 Indiana Journal of Global Legal Studies 621.

witness the Court's widening of its scope via the development of the principles of supremacy and direct effect—but to do so is difficult.

This model can be argued to be the most general form of several competing theories of court behaviour, one main difference between which is in where they envisage this boundary as falling. In terms of the Court of Justice, the neofunctionalist model regards the Court as the trustee of the treaties, with broad powers that are minimally constrained by the Member States.[5] It acknowledges the existence of the boundary but regards it as so widely drawn as to have little practical effect.[6] Meanwhile, the strong intergovernmentalism espoused by Carrubba, Gabel and Hankla (among others) regards the Court as the agent of the Member States, with severely limited scope for autonomous action.[7]

According to the model, the Court needs to estimate its zone of discretion before acting; thus, it is seen as continually weighing the possibility of government defiance against unhindered legal reasoning.[8] Member States' submissions provide this information to the Court. However wide its bounds are set, inside the zone of discretion the Court is considered to be protected from political influence. It is free to decide according to impartial legal principles—including that of maintaining consistency with the *acquis communautaire*—and according to the judges' normative and ideological positions.[9] Any external influence on the Court's reasoning in this zone is a matter of persuasive legal argument.

The Court's reasoning can be described by the model even if the judges do not frame their thinking in precisely those terms. The Court remains conscious of the distinction between states' legal arguments and any allusion they may make to the broader social and political context. The Member States, on the other hand, may or may not consciously make that distinction, partly depending on the clarity with which an Order for Reference lays out the EU law concerns of the referring national court.

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[5] Alec Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance' (2010) 5 Living Reviews in European Governance 1, 15.

[6] Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes' (n 4) 640.

[7] Clifford J Carrubba, Matthew Gabel and Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 APS Rev 435.

[8] Alec Stone Sweet, *The Judicial Construction of Europe* (OUP 2004) 9; Alec Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance' (2010) 5 Living Reviews in European Governance 1, 15; Olof Larsson and Daniel Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU' (2016) 70 International Organization 377, 384..

[9] Geoffrey Garrett, R Daniel Kelemen and Heiner Schulz, 'The European Court of Justice, National Governments, and Legal Integration in the European Union' (1998) 52 International Organization 149.

In the zone of discretion model, the Court of Justice receives three kinds of information: straightforward factual information, Member States' legal arguments and Member States' positions regarding policy and politics. Member States' provision of factual information impacts almost entirely on matters that fall within the scope of the Court's purpose—however strictly it is drawn—and add to the effectiveness of the Court's dispute resolution and the quality of its reasoning. As such, the information becomes part of the process within the zone of discretion but could be argued not to represent an unsought influence upon it.

The distinction between legal arguments and those based on policy can be difficult to make in a particular case, as the Member States almost invariably couch their 'political signals' in terms of legal interpretation: usually, but not always, with reference to public policy exceptions to EU legal rules. A much-debated example of a case where the boundary between political and legal reasoning was at issue is *Pringle*, in which the Court was accused by some of erring in its statutory interpretation in order to uphold a political decision, thus defending the European Stability Mechanism.[10] In total, twelve Member States submitted observations and the discussion in AG Kokott's Opinion indicates that Member States' arguments were phrased in legal and procedural terms. The UK government's intentions were, however, to challenge the use of the simplified revision procedure to increase the competences of the EU, which could be argued to constitute a political motive beyond the legal arguments discussed in the Opinion.[11]

In practice, the difficulty of distinguishing legal arguments from political arguments couched in legal terms is a stumbling-block for empirical research. Dederke and Naurin, for instance, acknowledge that there is a problem with identifying and operationalising the distinction between a Member State's political or policy views and its views on the legal issues.[12] They suggest that legal salience may be measured by the content of each case in terms of legal doctrines such as direct effect and sovereignty, or alternatively, how frequently each case is subsequently cited. For political salience, they score cases based on how controversial the issues were found to be at the legislative stage. This approach may well be appropriate for considering how the Court perceives observations, but there is a problem in applying it to Member States' motives, which is that—in the absence of the actual observations or at least Reports for the Hearing—these are ex-post

[10] See Paul Craig, 'Pringle and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) 9 European Constitutional Law Review 263 for a discussion.

[11] Case C-370/12 *Pringle* EU:C:2012:675, Opinion of AG Kokott.

[12] Julian Dederke and Daniel Naurin, 'Friends of the Court? Why EU Governments File Observations before the Court of Justice' (2018) 57 European Journal of Political Research 867, 873.

assessments. An issue of, say, direct effect might not have been detected by the government body that made a submission.[13]

The zone of discretion is regarded as delimited by the political tolerance of Member States. However, information about that boundary, and more generally about the political background and context of a case, may be conveyed to the Court by a Member State, a party, or the Commission. Politics should be distinguished from policy, which may frequently be a consideration *within* the zone of discretion. The Court of Justice not infrequently finds itself assessing the scope of national public policy limitations, and the Member States defending them. For instance, there were 146 cases in which the Court examined restrictions 'on the grounds of public policy' within the period of this study. Policy issues may, of course, be nationally politically sensitive, especially where matters of national identity or with financial repercussions arise, in which case it might be said that the zone of discretion has a broad or blurred boundary. It could be argued that this does not detract from the usefulness of the model but captures nuances that some models struggle to accommodate.

The Court may actively seek to discover the limits of its zone of discretion when it sounds out Member States' reactions to possible legal changes, in particular when the Court discusses extending the scope of EU law in the absence of a Treaty amendment. As noted in Chapter 4, the Court has occasionally reopened proceedings to request Member States' views on possible legal developments. In *Pfeiffer*, a question on the Working Time Directive was first remitted to a five-judge formation of the Court without an oral hearing. That chamber took the view that the question raised an issue of horizontal direct effect and referred the cases back to a full Court for an oral hearing. As AG Ruiz-Jarabo Colomer stated in his Opinion, 'A hearing was arranged to discuss that point, to which the Member States, the Council and the Commission as well as the parties to the main proceedings were invited.'[14]As noted earlier, the four Member States that took part indicated strongly that the Court should not extend the scope of direct effect. Such an inquiry has been extended to Member States that are not currently affected by a measure, as in *Tessili*,

[13] The same problem applies where a Member State has not made a submission but a case has subsequently acquired legal (or political) salience: see Chapter 5 re Case 148/78 *Tullio Ratti* EU:C:1979:110; Case C-106/89 *Marleasing v Comercial Internacional de Alimentación* EU:C:1990:395; Case C-144/04 *Werner Mangold v Rüdiger Helm* EU:C:2005:709; Case 120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42. An argument could be made for a re-opening of the hearing in these cases if (and only if?) a legal issue has become evident.

[14] Joined cases C-397/01 to C-403/01 *Pfeiffer* EU:C: 2004:227, second Opinion of AG Ruiz-Jarabo Colomer, para 4.

and it has been argued that this option may apply even where a state has an opt-out from the relevant area.[15]

This sounding-out of member-state governments concerning the boundaries of the zone of discretion not only tells the Court where Member States' limits are—within which they are unlikely to be non-compliant—but it can be argued that the process of consultation, or at least of allowing governments to be heard, may make compliance more likely.

Another area where the boundary of the zone of discretion is relevant is to matters of admissibility and justiciability. Questions of admissibility raised by the Member States usually concern the order for reference—the facts and legislative context of the national case and whether the relevance of the questions to it has been made clear. These are matters of legal procedure that lie within the Court's zone of discretion. Arguments relating to justiciability, on the other hand, concern the limits of that zone, often expressed in terms of competence and subsidiarity. Justiciability being—as Rasmussen points out—where politics intrudes into law, the limits of the Court's discretion are of much interest to the Member States.[16]

Some submissions are, at least in the main, disinterested contributions to the work of the Court. These include observations that clarify a confused order for reference or which explain the legal issues. Such submissions act purely within the zone of discretion. The same motive can usually be attributed when a Member State draws attention to matters that are not raised explicitly within an order for reference but can legitimately be inferred. However, as noted in Chapter 4 regarding issues of national identity, it is at least possible that matters concerning the boundary of the zone could be raised in this manner.

An interesting point is raised by Larsson's suggestion that the Court may analyse the Member States' observations in order to identify points of disagreement between them. The assumptions of this theory are the same as those of various versions of the zone of discretion model: that when Member States particularly dislike a judgment of the Court of Justice, they have it within their power to reverse the Court's decision by promoting and passing new legislation. In this way, as he says, the preferences of the governments do set boundaries to the Court's discretion.[17] Larsson suggests that, where there is substantial disagreement between the Member States, the Court may

[15] Case 12/76 *Tessili* EU:C:1976:133; Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (OUP 2014) 343.

[16] Catherine Barnard and Eleanor Sharpston, 'The Changing Face of Article 177 References' (1997) 34 CML Rev 1113.

[17] Larsson (n 1) 14.

recognise that their lack of consensus makes legislative override unlikely and use the opportunity to advance the law according to its own preferences. According to this theory, the Court is not merely the passive recipient of the Member States' preferences but a sophisticated player in the system of law-making. It can be argued that (if he is correct) the Court may actively use differences between the Member States' proposed answers to questions to move issues into its zone of discretion: that is, from the political field to the area within which the Court can exercise its own discretion.

As noted in Chapter 4, the submissions of member-state governments may affect various aspects of case management, from the formation of the Court to whether or not there needs to be an Advocate General's Opinion. These procedural effects can be argued to occur entirely within the Court's area of complete discretion; indeed, the Court's prerogative to deny requests for reopening of a hearing has invariably been exercised, while most of the effects that do occur, do so at the Court's initiative without the Member States being aware of them.

The final influence on the Court that was proposed in Chapter 4 was that the Member States' opportunity to have their say in proceedings had the systematic effect of contributing legitimacy to EU law in general and the Court in particular. Further to this earlier discussion, it can be argued that the Court's legitimacy (in the general sense) is bound to be harmed by suspicions that it is subject to political influence from the member-state governments. It is therefore essential to the Court's legitimacy that it is seen only to recognise persuasive *legal* argument and that it evaluates national policy concerns only in the light of EU legislation and general principles of law. The zone of discretion model helps clarify the boundary between these legal influences and any illegitimate political pressure on the Court's judgments. It can, however, be argued that the Court's limited reporting of the contents of Member States' submissions is unhelpful in allaying any fears about political manipulation.

The continuous discourse model

The second model proposed concerns the *flow* of information between the Court and the Member States rather than its effect on the Court. According to this model, Member States are always involved in the back-and-forth of EU decision-making, and the submission of legal arguments to the Court can be regarded as part of a continuous, dynamic process of communication between national governments and the European Union as a whole. On a particular topic, a Member State may fail to carry the day during the legislative procedure of the Council and find itself forced to adopt a position that does not (or does not entirely) reflect the government's position. Intervening

in Court proceedings gives the Member State a final opportunity to speak on behalf of its preferred position. The state may not always intend to circumscribe the scope of the legislation that was passed: states not infrequently defend national legislation that goes further than the contested EU legislation. German efforts to uphold a higher standard of fundamental rights are well known,[18] but another example would be cases in which a Member State has defended more extensive national environmental law.[19] In this model, there is no rigid distinction between political and legal interventions: interventions are functional and may include information about both a Member State's political stance on an issue and its preferred legal arguments.

The continuous discourse framework may be considered in two ways. The first is to apply the Exit and Voice model that originated in economics and was applied to the EU by Weiler:[20] Member States that are unhappy with the EU may choose to leave, or at least to disengage from some areas of the EU's legal regime (Exit), or they may attempt to change the EU from within (Voice).[21] The submission of observations to the Court can be regarded as a strong manifestation of Voice, and indeed one in which smaller and less powerful states are given the same opportunity to be heard as larger and more powerful ones. The second model originated in Europeanisation theory[22] and describes the bidirectional processes by which policies and values are 'downloaded' from the EU to the Member States and 'uploaded' from the Member States to the EU level.[23] Both aspects of this bidirectional process can be seen in the working of the preliminary reference procedure. These two conceptual frameworks do not necessarily compete, although they arise from different academic sub-disciplines and rarely seem to overlap. Both cast a slightly different light on the communication between the Member States and the EU, and both

[18] See e.g. Bill Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949-1979* (CUP 2012).

[19] E.g. Case C-149/94 *Vergy* EU:C:1996:37; Case C-202/94 *van der Feesten* EU:C:1996:39.

[20] Joseph HH Weiler, 'The European Community in Change: Exit, Voice and Loyalty' (1990) 3 Irish Studies in International Affairs 15.

[21] Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403.

[22] For a commonly agreed definition of Europeanisation see Robert Ladrech, 'Europeanization of Domestic Politics and Institutions: The Case of France' (1994) 32 JCMS 69: 'an incremental process re-orientating the direction and shape of politics to the degree that EC political and economic dynamics become part of the organisational logic of national politics and policy-making.' Later works regard Europeanisation as encompassing the reverse diffusion process to some degree.

[23] Kerry Howell provides a brief review of the concept of 'uploading' and 'downloading' of policy in the process of Europeanisation in a 2002 paper (Kerry E Howell, 'Up-Loading, Downloading and European Integration: Assessing the Europeanization of UK Financial Services Regulation' (2002)); Vivien A Schmidt, 'The European Union and National Institutions', *Democracy in Europe: The EU and National Polities* (OUP 2006).

can be reconciled into a more nuanced description of the relationship between the EU and its Member States. They are, however, discussed separately here.

Voice

The concept of 'Voice', with its corollary 'Exit', is adopted by Weiler in his 1991 paper 'The Transformation of Europe'[24] from the work of the economist Albert O Hirschman two decades earlier.[25] Hirschman's 1970 conception was intended to describe what happened when customers were disappointed with an organisation. They could vote with their feet (Exit). Or they could remain loyal to the organisation and effect change by complaining (Voice). Hirschman regarded Exit and Voice in game-theory terms as factors in a zero-sum game: the more the opportunity for effecting change given to the customer, the less likely the customer was to go to another supplier, and vice versa. He proposed that the same model could be applied to states: citizens afforded little opportunity for Voice—democratic or other political power—could, if sufficiently determined, choose Exit and leave.

Hirschman's application of the model may seem a long way from the question of how to account for an emerging European polity, concerning as it does the choices of individuals. Weiler, however, applied the model to the relationship between the Member States and the EU, characterising Exit as either a Member State's choosing to leave the EU—formal exit, which he optimistically regarded as improbable—or choosing either not to implement, or not to enforce, EU law. The latter could be described as selective exit, the opportunity for which he regarded as closed at the institutional and intergovernmental levels by direct actions, and at the national level by preliminary references.[26] Exit thus being, in his analysis, impossible, Weiler regarded Voice as the only choice left to Member States that wished to register any disagreement with the EU.

Voice can be analysed along several axes: it can be displayed most strongly in political or in legal terms at any particular time; it can be a force for integration or one for separation; it can be louder from some Member States than others. This last is manifested in the Council—not merely because the Member States differ in formal voting power[27] in policy areas where qualified majority voting applies, but because some are more organised and skilled at negotiating than

[24] Weiler (n 21).

[25] Albert O Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (Harvard University Press 1970).

[26] Weiler, 'The Transformation of Europe' (n 20) 2412-20.

[27] As represented graphically in Hirschman (n 25).

others. It can also be recognised at the Court, where Member States' capacity and willingness to engage with the Court, and skill in doing so, vary considerably.

Weiler analysed the political and legal developments of the EU in terms of different manifestations of Voice, from the strongest (the seizing of power by the Member States, particularly France, during the 1965 crisis and in its supposed resolution via the Luxembourg Compromise) to the most minor and technical.[28] He observed that there seemed to be a balance between the political and legal manifestations of Voice. At times when the political Voice of governments tended away from European integration, especially during the 'empty chair crisis' of the mid-1960s, the legal Voice of the Court of Justice was simultaneously developing the constitutional principles of direct effect and supremacy. Weiler argued that, had these integrative legal principles not been balanced by Member States' veto powers in the intergovernmental environment of the Council, it is unlikely that they—and the process of constitutionalisation that flowed from them—would have been accepted.[29]

This description refers to a balance between the political and legal powers of the Member States *en masse*. A similar logic applies to an individual Member State: in particular, where a Member State is unable to achieve its objectives via the Council and therefore switches its attempts to the Court of Justice. A Member State's interventions at the Court of Justice may be a manifestation of Voice—a downstream second chance for the Member State to recoup some of its losses at the upstream, legislative level or to reinforce legislation of which it is in favour. It can also be argued that interventions are a better source of information about the Member State's real preferences. This point is discussed further below, but it is important to recognise that voting outcomes at the Council are the result of several stages of preparatory work, at any of which a Member State's individual Voice may fall by the wayside.

When a Member State fails to have its way via any of the routes available at the Council, it may elect not to comply, possibly triggering a direct action or (further down the line) a preliminary reference.[30] Weiler predicts that non-compliance might become a deliberate strategy rather than

[28] One can speculate that the behind-the-scenes negotiations necessitated by the Luxembourg Compromise solidified the practice of 'corridor bargaining' that renders national positions at the Council so opaque.

[29] Weiler (n 21).

[30] This does not preclude more explicit actions to overturn Council decisions via the Court, such as the attempt by the Netherlands to overturn Directive 98/44/EC on the patentability of biotechnology in Case C-377/98 *Netherlands v Parliament and Council* EU:C:2001:523.

being the consequence of institutional incapacity.[31] This non-compliance can take several forms, from the most overt, such as failure to implement a directive, to the more subtle, such as lobbying the Commission during the process of fine-tuning legislation that has already been approved by the Council and Parliament.[32,33] Selective non-compliance could be regarded as the highest available form of Exit for a Member State that does not wish to exercise the option of withdrawing from the EU. Where non-compliance is challenged (most likely in the former situation since interference in the fine-tuning of 'implementing acts' may be impossible to detect and prove), any resulting legal actions give the Member State another—and often its last—opportunity for Voice.

A Member State's arguments in its defence and interventions in actions against other states provide it with the best and most direct chance for Voice, but they require the state (or another) to decide not to comply, or to do so in so dilatory or imperfect a manner that the Commission is forced to step in. Indeed, a Member State may have strong views on an issue that has no immediate national application. Preliminary references provide a greater, but less focused, possibility of exercising Voice. The broader scope of member-state governments' observations in preliminary references gives the opportunity for Voice to take many of the forms described in Chapter 5. It can, however, be argued that Voice is a better descriptor of, for instance, attempts to redirect the trajectory of an entire area of EU law or to defend a nation's sovereignty than of observations that put forward a Member State's preferred answer to a technical question. A Member State's disinterested assistance to the Court falls outside the model entirely.

As manifestations of Voice, 'pure' politics or law are rare, especially in the EU context. The Voice model of member-state observations at the Court sees them as different ways in which a Member State can attempt to achieve its ends, according to the forum in which the states' efforts are being exercised. Weiler takes the view that the legal developments issuing from the Court of Justice were simply one aspect of the wider discourse between the Member States and the then

[31] Weiler (n 21).

[32] For a discussion of different types of noncompliance, see Vivien A Schmidt, 'The European Union and National Institutions', *Democracy in Europe: The EU and National Polities*, vol 6 (OUP 2006); Gerda Falkner and Oliver Treib, 'Three Worlds of Compliance or Four? The EU-15 Compared to New Member States' (2008) 46 JCMS 293.

[33] Quentin Ariès and James Panichi, 'The "c-Word" and the EU Lobbyist: Assertive Parliament Forces Brussels Insiders to Fine Tune Dark Art of Comitology' [2016] Politico Europe Edition Online <http://www.politico.eu/article/c-word-and-the-eu-lobbyist-brussels-commission/>.

European Community. He points out that the 'judicial characterisation'[34] of the evolution of the European Union was deceptive and that 'Legal and constitutional structural change have been crucial, but only in their interaction with the Community political process.'[35] The 'opposing' forces are neither alternatives nor in opposition to each other, although they represent different intellectual models for analysis.

Uploading

Another way of describing the discourse between the EU and the Member States is to borrow terminology from Europeanisation theory. The processes of transnational EU policy-making involve flows of information about policy preferences between the Member States and the institutions of the European Union, which can be described as 'uploading' (the projection of national policy preferences onto the EU) and 'downloading' (a Member State's accommodation to EU rules and priorities).[36] The conventional view is that the more a state succeeds in uploading its policy preferences, the more EU law will be shaped after the national pattern and the easier the state will find it to accommodate the EU dimension at the national level.[37]

Mainstream Europeanisation theory has tended not to involve much mention of the Court of Justice. Academic discussion of uploading has concentrated on how Member States convey their policy preferences into what Connolly describes as 'the EU policy arena'[38]. This chiefly means Member States' participation in the Council, but it may involve a Member State having experts in place in the Commission or in the bodies that contribute to the negotiation process before voting takes place.[39] The inclusion of the Court of Justice within the EU policy arena is generally not a significant feature of the theory—making it substantially different from the 'integration through law' narrative—although the fact that the Court has *some* role is at least implied.[40] It is not,

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[34] As exemplified, in Weiler's example, by Stein's 1981 paper (Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1).

[35] Weiler (n 21).

[36] Tanja A Börzel and Thomas Risse, 'When Europe Hits Home: Europeanization and Domestic Change' (*EIOP European Integration Online Papers*, 2000) <http://eiop.or.at/eiop/texte/2000-015a.htm> accessed 10 August 2020.

[37] Börzel (n 2) 198.

[38] John Connolly, 'Europeanization, Uploading and Downloading: The Case of Defra and Avian Influenza' (2008) 23 Public Policy and Administration 7, 10.

[39] Börzel (n 2) 200; Diana Panke, 'Small States in EU Negotiations: Political Dwarfs or Power-Brokers' (2011) 46 Cooperation and Conflict 123, 123.

[40] E.g. Claudio M Radaelli, 'Europeanization: Solution or Problem?' in Michelle Cini and Angela K Bourne (eds), *Palgrave Advances in European Union Studies* (Palgrave Macmillan 2006) 70.

however, necessarily envisaged as providing a route for the uploading and downloading of policy. Blauberger and Schmidt review some of the academic literature and note that, where Europeanisation theory has considered the Court, it has tended to be regarded as promoting negative integration, or the elimination of trade barriers.[41] In that scenario, it is envisaged that there is little downloading of EU influence to governments (as opposed to judiciaries[42]) and no element of policy uploading from the Member States.[43]

Some authors acknowledge that the Court's interpretative role extends into making, and acting as a conduit for, policy decisions and consider the effect of Member States' interventions in terms of uploading. Slagter in particular explicitly describes the Member States as uploading their policy preferences via the Court in their observations.[44] Bulmer and Burch, discussing Europeanisation as it specifically applies to the UK government, note that the Cabinet Office European Secretariat 'articulate[s] UK interests in cases of significance to British European policy.'[45] Treib considers the interrelationship between uploading and downloading via the Court and suggests that Member States employ their observations to convey their concerns about the direction of case law and offer the Court an opportunity to qualify its earlier decisions and render its interpretation more palatable to governments, thereby smoothing domestic implementation.[46]

The occupational pension cases that followed *Barber* provide an example of this process. In *Barber*, the Court held that contracted-out occupational pensions were covered by the equal pay

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[41] Michael Blauberger and Susanne K Schmidt, 'The European Court of Justice and Its Political Impact' (2017) 40 West European Politics 907, 913 and see Karen J Alter and Sophie Meunier-Aitsahalia, 'Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision' (1994) 26 Comparative Political Studies 535; Alec Stone Sweet and Margaret McCown, 'The Free Movement of Goods' in Alec Stone Sweet (ed), *The Judicial Construction of Europe* (OUP 2004).

[42] See e.g. Marie-Pierre Granger, 'France Is " Already " Back in Europe : The Europeanization of French Courts and the Influence of France in the EU' (2008) 14 European Public Law 335; Juan A Mayoral, Urszula Jaremba and Tobias Nowak, 'Creating EU Law Judges: The Role of Generational Differences, Legal Education and Judicial Career Paths in National Judges' Assessment Regarding EU Law Knowledge' (2014) 21 Journal of European Public Policy 1120.

[43] Christoph Knill and Dirk Lehmkuhl, 'The National Impact of European Union Regulatory Policy: Three Europeanization Mechanisms' (2002) 41 European Journal of Political Research 258.

[44] Tracy Hoffmann Slagter, 'Uploading to the Court? Examining Member State Influence on ECJ Social Policy Decisions (Presentation at the Annual Meeting of the Western Political Science Association, Portland, Oregon, 23-25 March 2012)' (2012).

[45] Simon Bulmer and Martin Burch, *The Europeanisation of Whitehall: UK Central Government and the European Union* (Manchester University Press 2013) 97.

[46] Oliver Treib, 'Implementing and Complying with EU Governance Outputs' (2014) 9 Living Reviews in European Governance 13.

principle.[47] The decision had significant consequences for the organisation of pensions schemes throughout the EU, and in a line of subsequent cases, Member States sought to circumscribe *Barber*'s effects.[48] The Court did make a limited retreat from its decision, but the usual caveat applies: that it is impossible to know how much, if at all, it was influenced by the Member States' observations.

It could be argued that the characterisation of the discourse between the Member States and the Court as uploading and downloading better addresses the totality of member-state governments' interactions with the EU. The occasions upon which a Member State places extremely high stakes on an outcome at the Court or the outcome of a Council vote are relatively infrequent. A great deal of the EU's business is relatively mundane and unlikely to lead a Member State to the edge of rebellion, and this is especially true of much of the Court's day-to-day activity. While most cases raise issues of some economic importance to Member States, it is unlikely that a Member State would threaten non-compliance or, at the most excessive, to leave the EU over an unfair customs classification or the disapplication of a national measure on the categorisation of drinks. The uploading model accounts better for cases that are not legally ground-breaking but are everyday disputes about customs (10.3% of all cases in the period), VAT (8.7%) or social security (9.3%). From the Court's point of view, uploading can be argued to bear mainly on matters within its zone of discretion. For governments, uploading can be argued to represent a better model than Exit and Voice, in that Exit is rarely under consideration.

The continuous discourse model argues that Member States' interventions in proceedings at the Court taking place in the same argumentative space as their contributions to the Council. While everyday cases are not necessarily directly linked to voting outcomes at the Council, it can be argued that academic analysis of member-states governments' uploading policies in the legislative part of the policy arena can cast helpful light on the part that national executives play at the Court.

The uploading policies of individual states

Börzel observes that different Member States have different policies towards uploading their preferences, different policy goals and different success rates. She classifies those states that are relatively good at uploading their national preferences and enabling them to become the

[47] Case 262/88 *Barber* EU:C:1990:209.

[48] Case C-109/91 *Ten Oever* EU:C:1993:833; Case C-57/93 *Vroege* EU:C:1994:352; Case C-110/91 *Moroni* EU:C:1993:926; Case C-152/91 *Neath* EU:C:1993:949; Case C-200/91 *Coloroll* EU:C:1994:348.

mainstream view as 'pace-setters' and those that are less successful—or less able to make an attempt—as 'foot-draggers'.[49] Those that chiefly choose to work in cooperation with other Member States, trading off their policy concerns in some areas in exchange for support in more nationally salient policy areas, she terms 'fence-sitters'. Several writers have applied this classification to individual parts of the national executives: as regards the UK, for instance, Connolly found that the ministry of agriculture (DEFRA) was an active pace-setter with regard to uploading its policies on precautions against avian diseases whereas Slagter regards the UK as having been a fence-sitter with regard to social policy, attempting to block EU measures that it regarded as problematic rather than actively uploading its own policies.[50] Börzel herself regarded the UK as something of a fence-sitter on environmental policy.[51]

Differences in uploading between the Member States (or, as noted above, different ministries) may, of course, owe more to variations in their administrative capacity than to government policy. This was discussed regarding the submission of observations in Chapter 3. What follows is a brief examination of the effect of administrative capacity on the discourse in general between the EU and the Member States.

Schmidt devotes a chapter of her book to a comparison of the respective institutional capacities of France, Germany, Italy and the UK. She argues that national political structure is of the first importance, both as regards the degree to which Member States are Europeanised, and their ability to influence the EU.[52] She concludes that regionalised polities with partially diffused power, such as Italy, find it difficult to upload their preferences as effectively as unitary states such as France and the UK in which executive power is centralised.[53] Truly federal states such as Germany may also find it less easy to upload their preferences, as executive power is divided between the federal level and that of the sixteen states, with little central control. Schmidt quotes a Belgian permanent representative on COREPER as saying that Germany's performance there is 'typically, bad' as a consequence of the rivalries between the centre and the Länder.[54] As noted

[49] Tanja A Börzel, 'Pace-Setting, Foot-Dragging, and Fence-Sitting: Member State Responses of Europeanization' (2002) 40 JCMS 193.

[50] John Connolly, 'Europeanization, Uploading and Downloading: The Case of Defra and Avian Influenza' (2008) 23 Public Policy and Administration 7; Slagter (n 44) 20.

[51] Börzel (n 2) 206.

[52] Vivien A Schmidt, *Democracy in Europe: The EU and National Polities* (OUP 2006).

[53] Schmidt (n 52) 51.

[54] Schmidt (n 52) 58, quoting an interview with Baron Philippe de Schoutheete, permanent representative from Belgium, in an interview in 1997.

earlier, the same diffusion of power can mean that, if German ministries disagree as to the line to be taken, the government will not intervene in cases before the Court.

While a Member State's degree of centralisation of executive power directly affects its ability to express and upload its policy preferences, the majority of such uploading is performed by its national executive. Thus the state's administrative capacity is an essential factor which cannot readily be separated from the state's constitutional structure. In this context, it is nearly impossible to avoid mentioning Italy. It is frequently argued that Italy's diffused and contentious administrative arrangements render it poor at implementing EU provisions; certainly, it has been the Member State with the highest number of infringements declared by the Court.[55] As far as downloading is concerned, Radaelli (admittedly writing in 1997) says '[G]iven the instability of Italian governments and the miserable state of Italian public administration, Italy has a low potential for policy change.'[56] Schmidt observes that Italy has also been passive in projecting its policy preferences during the creation of legislation, while Thomson notes that a survey of officials working in the permanent representations of the Member States, the Commission and the Parliament reported that 'the Italian delegation often appeared poorly organised and unable to articulate a clear position in Council meetings.'[57]

Interestingly, however, Italy has been active in intervening at the Court of Justice,[58] and not just in direct actions or its own preliminary references.[59] In this case, it would be incorrect to generalise from Italy's behaviour in the Council to its behaviour before the Court. Nonetheless, it would be interesting to discover why it is more organised at the Court.

Radaelli contrasts Italy's performance with that of the UK in terms of 'macro-administrative variables': that is, the administrative capacity and efficiency of Whitehall as compared to that of

[55] See e.g. Court of Justice of the European Union, 'Annual Report 2014' (2015) Table 11, which shows that Italy had the most infringements declared by the Court over the period 2010-15.

[56] Claudio M Radaelli, 'How Does Europeanization Produce Domestic Policy Change? Corporate Tax Policy in Italy and the United Kingdom' (1997) 30 Comparative Political Studies 553, 556.

[57] Robert Thomson, 'The Relative Power of the Member States', *Resolving Controversy in the European Union: Legislative Decision-Making before and after Enlargement* (CUP 2011) 215.

[58] Italy has, per year, been the fifth highest submitter of observations in preliminary references, and 68% of those submissions have been in other states' cases.

[59] Marie-Pierre F Granger, 'States as Successful Litigants before the European Court Of Justice: Lessons from the "Repeat Players" Of European Litigation' (2006) 2 Croatian Yearbook of European Law and Policy 27, 37.

Italy.[60] Some factors that affected the UK's government's performance in uploading its preferences were discussed in Chapter 6: its constitutional history, which has given it a strong central administration, and the practical and historical factors that meant it developed the administrative capacity to deal with European matters in advance of membership. In addition, the UK's relatively proactive approach to uploading its preferences could partially be attributed to a philosophical position on the EU that included objections to any lessening of parliamentary sovereignty and the exceptionalism that may have resulted from its long political stability and its island geography. The consequences of this philosophy must, of course, include its adverse effects on the UK's standing with other governments and thus their likelihood of cooperating to upload policies. The UK was aptly described as 'an awkward partner'—but it was still a partner, in both the Council and the Court.[61]

There are several observations to be drawn from the foregoing. Firstly, member-state governments differ in their policies towards uploading their preferences. Secondly, and as noted in Chapter 5, 'which part of government?' may be an essential question. The third is that a state's administrative capacity may influence its ability to upload its preferences, but it might not affect uploading via the Court in the same way as uploading via the Council.

In the following section, the information to be gained about Member States' revealed preferences from the two sources—the Council and the Court—will be compared and contrasted. This appraisal of the sources is equally applicable to the Voice and uploading models.

Court v Council: the information to be gained from observations as compared to voting outcomes

The simplest description of the activity of the Council of the European Union is that the relevant representatives of the governments of the Member States vote on legislative proposals from the Commission. This description implies that the votes indicate the policy positions of the Member States. Things are, however, not that straightforward. Just as there are problems with obtaining the contents of Member States' observations at the Court, it may be difficult in practice to discover what position a Member State genuinely held during Council negotiations. The only evidence that is generally available about Council proceedings is the *formal* outcomes—voting results and any accompanying statements—and the information that can be derived from these

[60] 'Whitehall' being a metonymous usage for the British central administration: the ministerial departments and executive agencies of the government of the United Kingdom, largely excluding those of the devolved administrations.

[61] Stephen George, *An Awkward Partner: Britain in the European Community* (3rd edn, OUP 1998).

about member-state policy preferences is sparse. Firstly, recorded instances of voting against the majority or abstaining are relatively rare, and in their absence, it is difficult to discern a Member State's real preferences. If more than a small number of Member States objected to a measure, it is likely either to have 'stuck' at a lower level than the Council debate or—if it succeeded in making it to the Council chamber—to have been remitted to a lower level for further discussion. In either case, the member-state objections may never have been reflected in the public voting results at all.[62]

Secondly, what is discussed and voted on in Council may be a compromise in which some states' preferences have already been obscured. A state may have had reservations about a measure, but the issue may have been insufficiently salient for the state to register a 'no' vote or abstain, or its reservations may have been negotiated away during secret 'corridor bargaining'.[63] Even if a country's stated position in such bargaining were to be made public, there is a possibility that it would represent a negotiating position rather than being a reliable indicator of the state's policy preferences. As Thomson points out, states' policy *positions* are conceptually different from their policy *preferences*.[64]

Thirdly, any negotiating that happens in the Council chamber (and beforehand) is secret and the Council has argued that it should continue to be so. In part, its argument is based on the second point: that what takes place is not necessarily a straightforward exchange of national preferences. The Council tacitly acknowledged this in *Access Info Europe*, in which it appealed a judgment of the General Court that Access Info should be allowed to see the unredacted records of a Working Party that had been set up to consider a new regulation regarding public access to European institution documents. The Council said, '[B]earing in mind the preliminary nature of the discussions under way at that time, disclosure of the identities of the Member States concerned would have reduced the delegations' room for manoeuvre during the negotiations, which are a feature of the legislative procedure in the Council, and would, therefore, have impaired its ability to reach an agreement.[65] A similar argument was expressed by the General Court in *Carvel and Guardian Newspapers v Council*:

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[62] Sandrino Smeets, *Negotiations in the EU Council of Ministers: 'And All Must Have Prizes'* (ECPR Press 2015) Fig 2.3 for a diagram of the interplay between decision-making levels in the Council.

[63] Mikko Mattila, 'Voting and Coalitions in the Council after the Enlargement' in Daniel Naurin and Helen Wallace (eds), *Unveiling the Council of the European Union - Games Governments Play in Brussels* (Palgrave Macmillan 2008) 26.

[64] Thomson (n 57) 132.

[65] Case C-280/11 P *Access Info Europe* EU:C:2013:671 para 7.

> Outlining the reasons underlying the principle of the confidentiality of its proceedings, the Council points out that it works through a process of negotiation and compromise, in the course of which its members freely express their national preoccupations and positions. It is essential that those positions remain confidential, particularly if the members are forced to move away from them in order that agreement may be reached, sometimes to the extent of abandoning their national instructions on a particular point. This process of compromise and negotiation is vital to the adoption of Community legislation, and would be jeopardized if delegations were constantly mindful of the fact that the positions they were taking, as recorded in Council minutes, could at any time be made public through the granting of access to those documents.[66]

Smeets observes that the inner workings of the Council are directed towards achieving a mutually agreed text for legislation, where the participants simultaneously seek to reach a consensus and to legitimise their national positions. The arguments put forward are therefore more procedurally based than, and expressed in different terms from, the substantive positions of their governments.[67]

In any case, the researcher can only rely on such information on Member States' expressed preferences as is put into the public domain, which chiefly consists of actual voting results. Where states do persist in their disagreement and choose to abstain or vote against a measure, that fact is noted in the voting record, and they may also choose to submit a brief note of their reasoning. Such notes, and the voting records, may be obtained from the searchable register of official documents produced by the Council,[68] which contains links to public documents plus references to those documents that are not available online. Unfortunately, this information is only available from 1999 onwards, leaving research into Council decision-making before this severely hampered.

Mattila analysed Council voting during the period 2004-6, i.e. after the extension of qualified majority voting to almost all areas of policy.[69] It should be noted that, given the low rate of dissent in the Council, his sample was small. His first notable finding was that the overall number

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[66] Case T-194/94 *Carvel and Guardian Newspapers v Council* EU:T:1995:183, para 52.

[67] Smeets (n 62) 13–15.

[68] The Council's public register may be searched at <http://www.consilium.europa.eu/register/en/content/int/?typ=ADV> accessed 10 August 2020.

[69] Mattila (n 63) Table 2.4.

of negative votes and abstentions was very low. Ireland, during the period studied, was the state that was least likely to vote against the majority or abstain from votes on legislative acts (25th of 25), whereas the UK, for instance, was quite likely to do so (8th of 25). Hix, examining the longer period of 2004-9, found that the UK was the equal most likely to vote with the minority (with Austria), but that this only amounted to 2.6% of votes.[70]

For this paper, the exercise was repeated for 2008 using the search facility on the Council website. During this period there were 149 voting results, (including 12 that were packages of 26 votes passed unanimously). The Schengen opters-out Denmark, Ireland and the UK were not included in 3 voting results: one package plus two single votes. There were only 18 voting results in which there were abstentions (32 abstentions in total) and 7 in which there were votes against (9 negative votes in total).

Hix compared total votes in the period 2004-09 with 2009-15 and found a significant increase in the number of states voting against measures or abstaining. Nevertheless, the UK—the most likely to vote with the minority in both periods—voted with the majority in 87.6% of instances in 2009-15. These findings together indicate that most Council voting results are achieved by consensus and are poor predictors of Member States' policy preferences. Pre-vote negotiations cannot readily be deduced, although the likelihood of two states having cooperated to vote against or abstain *as a course of conduct* can be calculated. Naurin and Lindahl conclude that there is a very low probability of this occurring.[71]

At the Council, a Member State that disagrees with the others has four choices: to block a measure where that is an option, to vote against the majority, to abstain or to concede. In areas that require unanimity, an individual Member State might block progress in the Council, but it cannot necessarily persuade the other states to adopt its position. The majority voting process could leave it equally unsatisfied: if it does not abstain, either its voting position might not hold sway, or it might be induced to vote with the majority in return for concessions elsewhere. The latter is not unusual: Weiler notes that there has been a tendency for national executives go to

[70] Simon Hix and Sara Hagemann, 'Does the UK Win or Lose in the Council of Ministers?' (*The UK in a Changing Europe*, 2016) <http://ukandeu.ac.uk/explainers/does-the-uk-win-or-lose-in-the-council-of-ministers/> accessed 19 July 2020.

[71] Daniel Naurin and Rutger Lindahl, 'East-South-North: Coalition Building in the Council before and after Enlargement' in Daniel Naurin and Helen Wallace (eds), *Unveiling the Council of the European Union - Games Governments Play in Brussels* (Palgrave Macmillan 2008).

considerable trouble to achieve a consensus and avoid a vote.[72] Such a consensus is achieved by bargaining, but not necessarily by bargaining *within* the Council or even beforehand at the Committee of Permanent Representatives, COREPER. Indeed, some authors have questioned whether negotiations in and around the Council can be characterised as bargaining at all: Smeets describes what takes place as a 'non-competitive debate [which] consists of a series of individual attempts to get one's concerns incorporated in the outcome.'[73] Lewis points out that agreements in COREPER are achieved more collectively than adversarially,[74] and Elgström and Jönsson argue more generally that 'day to day negotiations in the EU are to a large extent problem-solving exercises'.[75]

Mattila, Hayes-Renshaw, van Aken and Wallace analysed the period 1998-2004 and found that some 30% of Council decisions were reached on the legal basis of unanimity and that some 75-80% of the decisions that might potentially have been decided by QMV had not been contested at ministerial level.[76] They conclude that 70% of Council business was settled beforehand, in working parties comprised of officials drawn from the executives of the Member States. It seems clear that the arguments pursued in the working parties would give a more accurate indication of a Member State's policy preferences than its votes in Council. It should be noted that the officials involved in the working parties may in some cases have close links with the legal advisers who might be called upon to compose any subsequent interventions in Court proceedings. This is certainly true of the UK, where the staff who give legal advice to the officials involved in EU negotiations and those who determine the content of UK submissions to the Court both fall within the Cabinet Office European Secretariat, combining legal advice and litigation responsibilities within the same division. Thus there is a direct link between the negotiating process before legislation is put to the vote and the preparation of government interventions and observations if a state's implementation is subject to legal challenge, however long these may be separated in time.

It can be argued that Member States are likely to see intervention in Court proceedings as a final opportunity to exercise Voice or to upload preferences, and that such an opportunity forms part of

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[72] Weiler (n 21).

[73] Smeets (n 62) 25.

[74] Jeffrey Lewis, 'Is the 'Hard Bargaining ' Image of the Council Misleading? The Committee of Permanent Representatives and the Local Elections Directive' (1998) 36 JCMS 479, 500.

[75] Ole Elgström and Christer Jönsson, 'Negotiation in the European Union: Bargaining or Problem-solving?' (2000) 7 Journal of European Public Policy 684, 689.

[76] Fiona Hayes-Renshaw, Wim van Aken and Helen Wallace, 'When and Why the Council of Ministers of the EU Votes Explicitly' (2005) 2005/25 2.

a continuum of dialogue with the EU. In principle, it should be possible to connect occasions when a Member State has voted against a measure in Council, or at least abstained, with a Member State coming back for a final attempt at changing the interpretation of a measure or persuading the Court that its version of the measure's implementation is the correct one. In practice, there are difficulties in pursuing this test.

One problem with positing a direct link between a Member State's Council votes and its interventions in Court proceedings is that the Member States cannot generally initiate Court actions themselves. They have to seize the opportunity to convey their preferences when the Commission challenges the implementation of a measure, or when a national court refers a case to the Court for its judgment on a point of EU law. It may take a long time for an issue that concerns a national government to come before the Court and for the member-state government's Voice to be heard. This is not to say that a government cannot influence the likelihood of a referral. However, it can be argued to be more likely to discourage a referral than to encourage one—Denmark, for instance, is reputed actively to discourage its national courts from submitting references.[77] Typically, however, circumstances have to come together to allow a government to bring broader considerations of policy before the Court of Justice. Thus, it may be impossible to find a case that deals with a specific Council measure to which a Member State has objected in the past.

It is not quite so difficult to find Member States intervening in court cases on *similar* topics to those where they have manifested disagreement with the majority in the Council. The Nordic Member States, for instance, are both more likely to express strong views on environmental matters in the Council and to intervene in environment cases. For example, in April 2007, Denmark and Sweden both voted against a proposal to amend Council Directive 76/769/EEC so as to restrict the sale of mercury-containing thermometers to the public, on the ground that those states already had tighter restrictions on the use of mercury. To date, there have been no cases concerning that amendment. But later that year, a direct action was brought against Sweden for making a unilateral proposal to restrict a particular organic chemical, circumventing the

[77] Jens Elo Rytter and Marlene Wind, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms' (2011) 9 International Journal of Constitutional Law 470, 489, citing Peter Pagh, 'Juridisk Special Udvalg og præjudicielle forelæggelser for EF-domstolen (The Judicial Committee and preliminary references to the European Court of Justice)' in B Olsen & K Engsig Sørensen (eds), *Europæiseringen af Dansk Ret* (*Europeanisation of Danish Law*) (Djøf Forlag 2008) 480.

procedure provided by the same Directive.[78] It seems reasonable to connect Sweden's view that the Council provisions did not go far enough in protecting the environment from one pollutant to its actions in respect of another, and to consider its submission in the latter case to represent its policy preferences on the urgency of environmental protection in general. However, it is not unusual for no case to have been brought on a measure at all.

Another difficulty, discussed in detail in Chapter 2, is that the content of member-state government submissions cannot be accessed directly but instead can only be deduced from the Reports for the Hearing, if any, or if they are mentioned in the Advocate General's Opinion (also if any) or, rarely, in the Court's judgment. In the absence of even that much information, it is hard to make general propositions about member-state governments' reasoning. Some well-known works on member-state government interventions assume that interventions are automatically made in support of the correctness of national legislation, or in favour of 'less Europe' or 'more national autonomy/sovereignty'.[79] There are problems with such assumptions, not least that the most enthusiastic interveners make the majority of their submissions in other states' cases. Many cases also turn on technical questions that cannot be characterised as 'more Europe' or 'less Europe'. Naurin, Cramér et al., in a thoughtful discussion of what assumptions are legitimate, use the example mentioned earlier of *Imexpo Trading*,[80] which turned on which of two customs tariff headings should be used for plastic chair-mats.[81] At first glance, there is not much to be learnt about Danish government policy from its observations in the case. It could be argued, however, that it illustrates a tendency for Danish referrals to be confined to just such technical matters and to steer clear of 'constitutional' questions.

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[78] Case C-246/07 *Commission v Sweden* EU:C:2010:203, in which Sweden was found in breach of its duty of loyal cooperation. Advocate General Poiares Maduro said, 'Sweden should have engaged in the Community decision-making process … even if, politically, it felt that its efforts to achieve a common proposal on the addition of PFOs to the Convention were as doomed as lemmings heading towards the edge of a cliff.'

[79] Clifford J Carrubba, Matthew Gabel and Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 American Political Science Review 435; Clifford J Carrubba, Matthew Gabel and Charles Hankla, 'Understanding the Role of the European Court of Justice in European Integration' (2012) 106 American Political Science Review 214; cf Alec Stone Sweet and Thomas L Brunell, 'How the Legal System of the European Union Works - and Does Not Work: Response to Carrubba, Gabel, and Hankla' (*The Selected Works of Alec Stone Sweet*, 2010) 1 <http://works.bepress.com/alec_stone_sweet/36> accessed 1 September 2015.

[80] Case C-379/02 *Imexpo Trading* EU:C:2004:595.

[81] Daniel Naurin and others, 'Coding Observations of the Member States and Judgments of the Court of Justice of the EU under the Preliminary Reference Procedure 1997-2008' (2013) Centre for European Research of the University of Gothenburg Working Paper 2013:1, 33.

Another situation in which simple assumptions may be confounded is where Member States find themselves in a position of having to make a strategic decision in a situation in which the interests of a national industry conflict with considerations either of national sovereignty or, contrarily, of the general effectiveness of EU law. To take (yet again) the example of *Nouvelles Frontières*, the UK's observations in support of the direct effect of competition rules in the air transport industry argue for 'more Europe'.[82]

Facile assumptions about a member-state government's position also fail in those situations described in Chapter 5 where Member States make observations in preliminary reference cases that are intended only to clarify the legal issues or facilitate the Court's proceedings. As noted in Chapter 6, the UK was known occasionally to make observations of this type. It is necessary to examine each case on its own merits.

Finally, there is the question of what can reasonably be deduced from a Member State's silence on an issue. Leaving aside those instances where a shortage of organisation and resources prevents a state from intervening when it would wish to do so, a member-state government may decide to refrain from intervening because it cannot reach a consensus on what to say: for example, in Case C-110/05 *Commission v Italy (Trailers)*.[83] As has been pointed out, Member States are not monolithic institutions but systems of multilevel governance, within which there may be divergences of opinion within a level as well as between levels. Notably in the case of Germany, no observations are submitted if two ministries disagree on what the state's position should be. In these circumstances, it is difficult to distinguish a *lack* of interest in the legal issues raised in a case from what may be of *great* interest, but subject to a difference of opinion. Such instances may be of considerable intrinsic interest in terms of what they could tell researchers about policy disagreements that may not have been manifest in the particular conformation of the Council that reached a decision.

A point which has not been touched on is the relative quality (as opposed to the content) of observations as compared with Council votes. Member States' observations are, at least in principle, carefully thought-out legal arguments aimed at a highly trained judicial audience, whereas any public statements made on Council matters are either very general or intended for a political audience. As such, the latter are unlikely to display their reasoning.

[82] Joined Cases 209 to 213/84 *Asjes* EU:C:1986:188.

[83] Case C-110/05 *Commission v Italy (Trailers)* EU:C:2009:66.

What these difficulties emphasise is that drawing sweeping conclusions based on massed empirical data from the Council may be unwise. There is simply too little information to be extracted from Council voting records and too many circumstances in which even the information that is available may be misleading. Most of the difficulties mentioned above can be side-stepped by carrying out case-studies, but it should be recognised that solely following up those situations where there have been abstentions or negative votes in Council only tells a small part of the story of a member-state government's behaviour. Despite this, it is possible to pick out some themes and to draw some general conclusions about possible continuities between member-state governments' behaviour in Court and Council.

Conclusion

Superficially, both the Voice and the uploading models would seem to be similar, describing communication between the Member States and the EU (or, in the Exit and Voice model, communication as an alternative to non-participation). However, it can be argued that the Exit and Voice model describes power: Member States have the power to leave, or the power to force (or persuade) national preferences on the EU as a whole. To constitute Voice, national preferences have to be realised, at least to some extent. Uploading is subtly different in conception, although it describes the same phenomena. It is a transfer of policy-preferences, by whatever means, that does not, immediately and of itself, alter the balance of power between transferor and transferee. Of course, summed over a period, large-scale uploading and downloading are bound to change the status of both parties, 'Europeanising' a member-state recipient and effecting policy change and even constitutional change—witness Germany's effect on fundamental rights via its constitutional court— on the EU as recipient.[84] But they can be pictured less as shifts in power and more as mutual policy adjustments. More generally, some authors have taken issue with the whole concept of Europeanisation, claiming that it is not a separate field but merely a rebranding of (among other concepts and depending on the background of the critic) theories of European integration.[85] It is hoped that the distinction between these models makes it clear that they are more than the same thing, rebranded.

It can be argued that the two models—of Voice or uploading—lead to slightly different research questions. In the context of this research, the Voice model prompts the question of whether the

[84] Bill Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949-1979* (OUP 2012).

[85] See Claudio M Radaelli, 'Europeanization: Solution or Problem?' in Michelle Cini and Angela K Bourne (eds), *Palgrave Advances in European Union Studies* (Palgrave Macmillan 2006) note 3.

behaviour of individual states at the Council and the Court supports the proposition that the Court may afford the Member States a last opportunity to exercise Voice. A fully comprehensive analysis would require a comparison of states' (lack of) success in achieving particular legislative goals via the Council with specific attempts to persuade the Court to their view on the same issues, followed up with an examination of whether the Court's judgment is followed by the national court and implemented at the national legislative level. This would make a useful and fascinating contribution to the field, but it is beyond the scope of this thesis. Meanwhile, the uploading model begs a comparison of states' success in conveying their views in the various settings and the consistency of their messages.

This chapter concludes that member-state governments' observations in court cases not only form part of the evidence of Member States' policy preferences and attitudes to the EU but may be a more useful source of information on those preferences and attitudes than can be deduced from their votes at the Council. A Member State's vote does not necessarily indicate its true preferences but is the tip of an iceberg of bargaining and negotiation in a Council that still has a strong drive towards consensus, even when a qualified majority is all that is needed. By contrast, a Member State's submissions to the Court are more likely to express its government's real preferences. If the government has agreed a position with other Member States, it has probably not made a bargain with so much at stake: such agreements usually fall within the realm of low politics.

Chapter 8: Conclusion

It has been said that EU legal studies are under-theorised. But it could be argued that, in an area that stands on the fulcrum of political science and law, the process of seeking theories has caused researchers to tip towards one side or the other and in doing so to oversimplify their accounts of the alternative disciplines. Because they frequently overlook historical *legal* context and legal logic, political scientists' models can be fragile. Meanwhile, it is easy for legal scholars to overlook the non-legal actors involved in cases and the political and economic context in which cases take place. There is also a tendency to regard the development arc of the *acquis communautaire* as the inevitable working-out of legal reasoning rather than something that is, as Nicola and Davies describe, more fragmented and contested.[1] This is nowhere more true than in theoretical attempts to account for Member States' interactions with the Court of Justice—and in the search for empirical evidence to back up such attempts.

This thesis uses evidence drawn from Member States' submissions to the Court to demonstrate that governments' motives for interacting with the Court of Justice are more complex, varied and contingent than the standard theories assume. The empirical data—including not just the frequency and topics of Member States' observations but, where possible, their content and inspiration—have been used to draw up a taxonomy of Member States' motives. This taxonomy indicates the breadth of these motives and enables a theoretical framing which positions them within the argumentative space in which Member States convey their preferences to the EU. The taxonomy draws attention to features of the judicial relationship between governments and the EU that are frequently overlooked, and it provides tools for the evaluation of any model of the relationship between member-state governments and the Court.

When this research was started, the intention was to look for evidence in support of the competing integration theories espoused by various schools of political science but then to analyse that evidence with due respect for legal reasoning. This search was to be limited to preliminary reference cases—a limitation that had already become so characteristic of much legal integration research as to become a trope. There were several reasons why the scope of the research eventually became more modest. The required statistical analyses beloved of political scientists were being done elsewhere by those with more resources and statistical acumen, if not

[1] Bill Davies and Fernanda G Nicola, *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Fernanda Nicola and Bill Davies eds, CUP 2017).

necessarily with more legal insight. It became clear that elaborate theoretical models were being constructed and defended without much regard for their prior assumptions. Analyses were being carried out based on the classification of Member States' positions as 'more Europe', 'less Europe' and 'neither of the above' without regard to what questions the Court of Justice had been asked, what the Court asked of member-state governments and why, what it did with the information and why Member States chose to interact with the Court at all. A small number of researchers had asked empirical questions that addressed these issues, but their results had either been oversimplified in support of particular integration models or were expressed very generally such that they were of only preliminary assistance in exploring the dynamics of the relationship between the Court of Justice and the Member States.

It became clear that it would be helpful to use the evidence available—quantitative and qualitative—to evolve a taxonomy of interactions between the Court and the governments of the Member States. By employing such a taxonomy, it would be more difficult for the *legal* aspects of such interactions to be ignored. In particular, it would be harder to overlook the procedural aspects, such as governments' influence on the likelihood of an Opinion, which have been absent from political scientists' discussions. Equally, it would assist legal scholars in keeping in mind that national governments' involvement in EU law is not confined to voting in the Council. Most importantly, characterisations of member-state governments' submissions to the Court either as attempts to exercise political pressure, or as merely conveying necessary information about national legal provisions, represent a false dichotomy. Not only are both of these motivations more complex than the theoretical models allow, but governments may be doing both of these, or something else, or may be divided such that different departments have different motivations.

A taxonomy of member-state interventions with the Court must have some analytical and theoretical backing. The temptation was to analyse it in terms of the somewhat outmoded intergovernmentalism versus neofunctionalism dichotomy and to draw attention to those areas where the taxonomy did not readily fit either model. But in drawing up a taxonomy that acknowledged the role of legal reasoning in the relationship between the Court and the Member States, it was clear that neither model gave sufficient consideration to legal logic. Neofunctionalism tends to treat the Court as a black box which is fed disputes and disgorges judgments; legal reasoning takes place inside the box and is insulated from external influences. Meanwhile, intergovernmentalism portrays the Court as an agent of the Member States, which can subvert legal reasoning when their policy preferences are threatened. This view denies judicial independence, the logic of the Court's reasoning and the degree to which that reasoning

is respected at the national level. Neither model accounts well for the range of everyday activities of the Court, although it could be argued that neofunctionalism better addresses the quotidian nature of most of the cases that the Court has to deal with. However, instead of trying to confine the categorisation of governments' interactions with the Court to these well-worn tramlines, it has been argued that it is better to classify governments' interactions with the Court in terms of a continuous dialogue between the Member States and the European Union—of which submissions to the Court are only one aspect.

Most of the contention between integration models *as they specifically concern the role of the Court of Justice* can be argued to turn on a single aspect – the borders of the zone of discretion. Within the zone of discretion, the Court is envisaged as free to make decisions without external political influences. Outwith the zone of discretion, any 'activism' on the part of the Court may be ignored or repealed. The extent of the zone of discretion is relevant to both the intergovernmentalist and neofunctionalist models. Even intergovernmentalists acknowledge that the work of the Court is not invariably circumscribed by threats of override or disobedience. A zone of discretion exists, and its definition is of considerable importance in a minority of cases. In those cases, Member States' observations are an essential tool in the process of walking the fine line between ensuring the effectiveness of the Treaties and triggering a backlash from the Member States. However, much of the work of the Court falls within the zone of discretion. The area inside its boundaries is far from being neofunctionalism's black box. Inside the zone of discretion, Member States' observations have precisely the effect that legal scholars would predict: that is, the Court's decision-making is open to credible legal argument from member-state governments. The evidence supports a finding that most Member States believe that they have sufficient influence on the legal argumentation of cases to invest resources in participating, and indeed their role is enshrined in Statute of the Court of Justice and encouraged by the Court.

All the different legal integration theories vary as to where the zone of discretion ends. This boundary of the zone of discretion is where political and legal considerations meet, and where the dialogue between the Member States and the Court moves from the legal context to the political context. It should be understood that the Member States seldom make the position of the boundary explicit in their observations. Any attempts to express 'thus far and no further' are framed in terms of defending their interpretation of a provision of EU law, or casting doubt upon the admissibility of a question, or otherwise in terms of legal argument. However, it is argued in this thesis that many of the legal arguments made in Member States' observations are, in any case, directed at legal issues *within* the zone of discretion. The government lawyers that draw up

written submissions and speak at oral hearings are attempting to persuade the Court of the correctness of their national legal reasoning. They are not *explicitly* laying out domestic political considerations, even if the political background is expected to be mutually understood.

From the perspective of the Member States, their submissions to the Court are characterised in this thesis as one part of a continuous discourse between each state individually and the EU (in the form of its institutions), plus to a lesser degree with the other Member States. At one level, this is obvious: if a government feels strongly about an EU legal rule, it is likely to press its case at every step of the process of creating and interpreting the legislation. Thus it should be possible to connect a Member State's position as manifested at the Council with the content of its submissions to the Court. However, as Chapter 7 discussed, a Member State's vote in the Council may not represent its preferred policy position—in fact, it can be argued that its votes are less likely to do so than its submissions to the Court.

While Member States' interventions are potentially more informative than their votes, there are obstacles to making a direct connection between a government's policy and its submissions to the Court. The first is that, unless it has been the subject of legal action by the Commission, a Member State must wait for a relevant preliminary reference to be made to the Court—which may never happen. And if a suitable case occurs, there may be minimal information available about the content of governments' submissions and little prospect of obtaining more via a Freedom of Information request.

Merely knowing that a Member State submitted observations—without knowing their content—is not, however, useless. It illustrates the question raised, in particular, by Granger: why do Member States submit observations, and—often more interesting—why do some not? Some general conclusions were reached in Chapter 3: the chief reasons why Member States choose not to participate in proceedings at the Court are a shortage of resources (financial or organisational) and the existence of constitutional objections to using the Court as a legitimate avenue of communication with the EU. The latter was explored in Chapter 6 regarding Denmark in particular. Participation is also affected by structural, historical, political and contextual factors.

Equally, knowing the subject areas in which Member States chose to submit observations—without knowing their content—is not without interest. It is unlikely to be coincidental that Denmark, Ireland and the UK are (or were) relatively more likely to submit observations in cases concerned with the free movement of workers, citizenship and national identity than with, say,

agriculture. For considerations of space, this topic was shelved, although charts of the 1973 accession countries' submissions in some major subject areas may be found in Appendix D.

The benefit resulting from the discourse between the Member States and the Court of Justice is not confined to the Member States. The Court's *Notes for the Guidance of Counsel* lay out their envisaged purpose: to 'set out the factual circumstances of the case before the national court and the relevant national legislation'.[2] The wider significance of governments' observations to the Court are discussed in Chapter 5 and can be seen to extend well beyond any attempts to convey the whereabouts of their red lines. Some submissions may be classified as legal advice: clarifying the questions the Court needs to answer from an order for reference, drawing attention to their legal implications and analysing relevant case law. Others have an impact on the procedure chosen for a particular case: whether an Opinion is needed and what formation of the Court should consider the referred questions. It is also argued that the existence of the opportunity for governments to put arguments to the Court supports the authority and legitimacy of the Court and the *acquis communautaire*. Part of the inspiration for this project was the observation that such beneficial contributions to the process of dispute resolution by the Court were neglected by, notably, political scientists.

Most popular models of the interaction between the Member States and the Court are more likely to examine the use *to the governments* of making submissions to the Court. Their analyses, however, are very different, and each can be argued to contribute to significant failings in their theories of the constitutionalisation of the legal system. Intergovernmentalist models have emphasised governments' political red lines in their discussion of Member States' motives for making submissions, to the detriment of considering their observations' context and content. Legal/doctrinal accounts—if they discuss governmental contributions at all—may be better informed as to the legal purpose and content of observations and thus recognise a broader range of possible motives. Nevertheless, it can be argued that even legal/doctrinal models skate over a significant proportion of member-state interactions with the Court, taking into account mainly those that contribute to a constitutional narrative arc. While the neofunctionalist model is not guilty of cherry-picking cases to fit its theory, it demonstrates a different error: of according insufficient importance to legal reasoning and the history and ideological aims of the European Union.

[2] Registry of the Court of Justice of the European Communities, *Notes for the Guidance of Counsel* (Court of Justice of the European Communities 2009) s 9.

The empirical evidence has been found to support none of the classic political science models completely because each neglects some discernible aspect of Member States' motivation in participating in proceedings at the Court of Justice. As the previous chapters have shown, governments have many reasons for submitting legal arguments to the Court of Justice. The weight given to each of these reasons varies with time, the pertinence of the subject-matter and a state's administrative capacity. Chapter 5 offers a taxonomy of possible motives, from the routinely financial to the strengthening of the EU's legal system; from the small scale and technical to matters of broad constitutional interest; and from the disinterested clarification of matters of EU law to the expression of national red lines.

Chapter 6 considers each of these motives with reference to Denmark, Ireland and the UK. Such a comparison is not an entirely straightforward exercise. Direct evidence—that is, evidence from the contents of submissions—is slight for some motives. Participating in proceedings in support of another Member State is an example of this. There is statistical as well as anecdotal evidence that it occurs, but it is hard to detect. Some motives, however, are evident in many interventions, and instances can readily be found in the observations of all three of the 1973 accession states. The clearest example is the defence of their transposition of EU law.

Chapter 6 also considers the sources of the variations between these three Member States. It could be argued that the differences between these three *by themselves* should challenge models that generalise about Member States' reasons for making submissions. Despite being geographically close, having joined at the same time with similar concerns about immigration and national identity, and having secured overlapping opt-outs, the three have significant dissimilarities as regards their interaction with the Court. The distinctive features of each are discussed in some detail in the chapter and can usefully be compared with the analysis of states' overall engagement with EU law in Chapter 3.

Some of the differences in readiness to intervene are simply the result of size and overall wealth, but as Chapter 3 identifies, the differences between similarly sized smaller states are significant. It is argued that the primary source of these further disparities can be found in the historical and constitutional aspects of their different relationships with the EU. Denmark's majoritarian tradition makes judicial review unpalatable and judicial review by a supranational body more so. Its dialogue with the EU is mainly the responsibility of an executive body that not only stands between the Danish national courts and the Court of Justice but also limits its engagement with the latter. Ireland, meanwhile, is a more enthusiastic European but its relationship with the UK, combined with low institutional capacity tends to restrict its influence on EU law. Unlike with

Denmark, the UK's status as the awkward partner did not limit its engagement with EU law. The UK developed the institutional capacity to identify and respond to any upcoming cases that the government regarded as requiring British input; consequently, it was able to submit observations in relatively many cases during its membership. The government's policy of more frequent intervention also gave the UK scope for a broader range of motives, including submissions aimed at assisting the Court or promoting the health of EU law without any immediate domestic benefit.

It is difficult to reconcile even this outline of the differences between the 1973 accession states with models that oversimplify or ignore the role of the Member States or portray them only as cooperating to limit the Court's influence. Paradigms are only useful as long as they fit the evidence. When new evidence is recognised, paradigms shift. From a lawyer's point of view, the intergovernmentalist and neofunctionalist positions can be seen as denying the internal logic of law; as Grimmel notes, 'integration theory today treats the law as a black box: an object that has a shape but an unknowable content.'[3] From a political scientist's viewpoint, the legal explanation only draws on a subset of the evidence. It might be argued that integration theory treats *governments* as black boxes: as homogeneous entities with a single will. It can be seen that they are not.

The paradigms can only be reconciled by accepting that reality is both more complex and more mundane. As the previous chapters have shown, governments have many reasons for submitting their own legal arguments to the Court of Justice. The weight given to each of these reasons varies with time, the pertinence of the subject-matter and a state's administrative capacity. The characterisation of member-state observations has moved far beyond the threats of non-compliance and legislative override detected by Garrett et al., Carrubba, Gabel and Hankla, and Kilroy (and challenged by Stone Sweet and Brunell).[4] Far from being one-way ultimatums, governments' submissions are of immediate use to the Court, and some of their content may be specifically requested. Equally, motives have been identified for the submission of observations that go beyond a Member State's immediate benefit—even, arguably, with only the most tenuous

[3] Andreas Grimmel, 'Judicial Interpretation or Judicial Activism? The Legacy of Rationalism in the Studies of the European Court of Justice' (2012) 18 European Law Journal 518.

[4] Geoffrey Garrett, R Daniel Kelemen and Heiner Schulz, 'The European Court of Justice, National Governments, and Legal Integration in the European Union' (1998) 52 International Organization 149, 150; Clifford J Carrubba, Matthew Gabel and Charles Hankla, 'Understanding the Role of the European Court of Justice in European Integration' (2012) 106 American Political Science Review 214; Bernadette Ann Kilroy, 'Integration through the Law: ECJ and Governments in the EU' (UCLA 1999); Alec Stone Sweet and Thomas L Brunell, 'The European Court of Justice, State Noncompliance, and the Politics of Override' (2012) 106 American Political Science Review 204.

expectation of any long-term advantage. But it is clear that submissions represent an exchange of ideas with the Court and that whatever benefit accrues may do so to both sides of the discussion.

Member States do attempt to influence the Court—when they recognise the opportunity, when they think they can succeed and when they have the resources—but via legal arguments and legal logic. Governments' observations are, after all, composed (usually) and delivered (invariably) by lawyers. The Court makes use of their contributions and often solicits them. At the same time, the Court is made aware, on the one hand, of political lines that it would be painful to cross and on the other, is influenced in both the substance and style of its judgments by the constant back-and-forth of legal argumentation with the Member States. Whether this discourse is looked upon as a manifestation of Voice or as the uploading and downloading of influence, Member States have a genuine and essential presence on the judicial scene that must be accounted for in any convincing model of EU legal integration.

Once governments' arguments to the Court are comprehended in this way—as constituent parts of a more general discourse on EU law between the Member States and the institutions—they can be seen not just to be significant, if frequently overlooked, contributions to EU *legal* integration but to be one of the many threads of communication and cooperation that make up European integration as a whole.

Appendix A Subject Codes

Subject	Code	Area
Accession	301	ACC
Compensation Payments on Accession	433	ACC
Justice and Home Affairs	365	AFSJ
Brussels Convention of 27 September 1968	403	AFSJ
Brussels Conv Jurisdiction	404	AFSJ
Brussels Conv Enforcement	405	AFSJ
Lugano Convention of 16 September 1988	406	AFSJ
Rome Convention of 19 June 1980	408	AFSJ
Judicial Cooperation in Civil Matters	432	AFSJ
Judicial Cooperation in Criminal Matters	461	AFSJ
Customs Cooperation	434	AFSJ
Area of Freedom, Security and Justice	460	AFSJ
Agriculture	302	AGRI
Animal Feed	303	AGRI
Alcohol	304	AGRI
Beef and Veal	305	AGRI
Cereals	306	AGRI

Compensatory Amounts	307	AGRI
Foodstuffs	308	AGRI
Fruit and Vegetables	309	AGRI
Dehydrated Food Grain	310	AGRI
European Agricultural Guidance and Guarantee Fund	311	AGRI
Processed Fruit and Vegetables	312	AGRI
Products Outside Annexe II of the Treaty	313	AGRI
Hops	314	AGRI
Flax and Hemp	315	AGRI
Milk Products	316	AGRI
Oils and Fats	317	AGRI
Monetary Measures	318	AGRI
Eggs and Poultry	319	AGRI
Sheepmeat and Goatmeat	320	AGRI
Plants, Flowers and Foliage	321	AGRI
Potatoes	322	AGRI
Fisheries	323	AGRI
Plant Health	324	AGRI
Peas and Field Beans	325	AGRI
Pigmeat	326	AGRI

Rice	327	AGRI
Seed and Plants	328	AGRI
Forestry Products	329	AGRI
Agricultural Structures	330	AGRI
Sugar	331	AGRI
Tobacco	332	AGRI
Veterinary Legislation	333	AGRI
Wine	334	AGRI
Silkworms	335	AGRI
Common Foreign and Security Policy	384	CFSP
European Citizenship	339	CITI
Competition	343	COMP
State Aids	344	COMP
Dumping	345	COMP
Undertakings	346	COMP
Exclusive Contracts	347	COMP
Dominant Position	348	COMP
Concerted Practices/Cartels	349	COMP
Industrial and Commercial Property	350	COMP

Development Cooperation	338	COOP
European and Social/Territorial Cohesion	340	COOP
Structural Funds	342	COOP
Integrated Mediterranean Programmes	423	COOP
Regional Policy	424	COOP
Culture	352	CULT
Data Protection	470	DATA
Balance of Payments	337	ECON
Conjunctural Policy	351	ECON
Financial	358	ECON
Budget	359	ECON
EC/EU's Own Resources	360	ECON
European Social Fund	363	ECON
Economic and Monetary Policy	380	ECON
Central European Bank	380	ECON
European Monetary Institute	381	ECON
European System of Central Banks	382	ECON
Industrial Policy	385	ECON

Contractual Liability	391	ECON
Trans-European Networks	392	ECON
Protective Measures	394	ECON
Transport	397	ECON
Telecommunications	439	ECON
Insurance	455	ECON
Banking	546	ECON
Financial Law	547	ECON
Educational, Vocational, Youth	354	EDUC
Research and Technology	390	EDUC
Environment	355	ENV
Energy	411	ENV
Commercial Policy	356	EXTL
Dumping	357	EXTL
Coffee	402	EXTL
Cotton	407	EXTL
External Policy	412	EXTL
African, Caribbean and Pacific States	413	EXTL
EFTA	414	EXTL

Food Aid	415	EXTL
External - Association	416	EXTL
Quotas - Third Countries	417	EXTL
African States and Madagascar	418	EXTL
European Development Fund	419	EXTL
GATT and WTO	420	EXTL
Free Movement of Capital	366	FRCA
Free Movement of Goods	367	FRGO
Industrial and Commercial Property	368	FRGO
Quantitative Restrictions	369	FRGO
Measures Having Equivalent Effect	370	FRGO
Monopolies of a Commercial Character	371	FRGO
Customs Union	372	FRGO
Charges Having Equivalent Effect	373	FRGO
Common Customs Tariff	374	FRGO
Value for Customs Purposes	375	FRGO
Freedom of Establishment, Services	377	FRSE
Freedom of Establishment	378	FRSE
Freedom to Provide Services	379	FRSE
Strengthening of Cooperation (43-45 EC)	435	FRSE

Free Movement of Workers	376	FRWO
Social Security for (Migrant) Workers	395	FRWO
Charter of Fundamental Rights	409	FUND
Visa, Asylum and Immigration	431	IMM
European Investment Bank	336	INST
Provisions Concerning the EC/Institutions	364	INST
Measures Adopted by Institutions	401	INST
Privileges and Immunities of the EU	425	INST
Contractual and Non-Contractual Liability of EU	427	INST
Staff Regulations	428	INST
Procedural Provisions	438	INST
Trademarks (OHMI) (now see 451)	430	IP
IP - Industrial and Commercial Property	450	IP
IP - Trademarks/OHMI	451	IP
Judicial Procedure inc standing re Art 267	426	JUST
French Overseas Departments	353	OVER
Overseas Countries and Territories	388	OVER

Member State interactions with the Court of Justice 2013	Court of Justice - observations in preliminary references (judgments)	Court of Justice - observations in preliminary references (orders)	Court of Justice - as party	Court of Justice - intervener in case other than preliminary reference	General Court - interventions	General Court - party	All
Austria	31	3	1	2			37
Belgium	32	1	3	10		2	48
Bulgaria	5	1	3			3	12
Cyprus	3		1				4
Czech R	27	1		8	1	2	39
Denmark	15			5	1		21
Estonia	10	1	4	5			20
Finland	11		3	4			18
France	48	3	3	11	2	7	74
Germany	67	1	6	13	3	2	92
Greece	41	2	6		1	5	55
Hungary	20	1	2	2	1	1	27
Ireland	10			1			11
Italy	52	4	6	3	2	14	81
Latvia	5	1					6
Lithuania	12	1			1	3	17
Luxembourg			1	2			3
Malta	1				2		3
Netherlands	48	1	3	17		4	73
Poland	46	2	8	8		3	67
Portugal	28		2	1	1	1	33
Romania	8	2	3		1		14
Slovakia	1	1	2	2		2	8
Slovenia			3		1	1	5
Spain	36	5	9	5	6	9	70
Sweden	14	1	1	8	2		26
UK	33	2	6	14	1	4	60
Total	604	34	76	121	26	63	924

Appendix C Dutch checklist

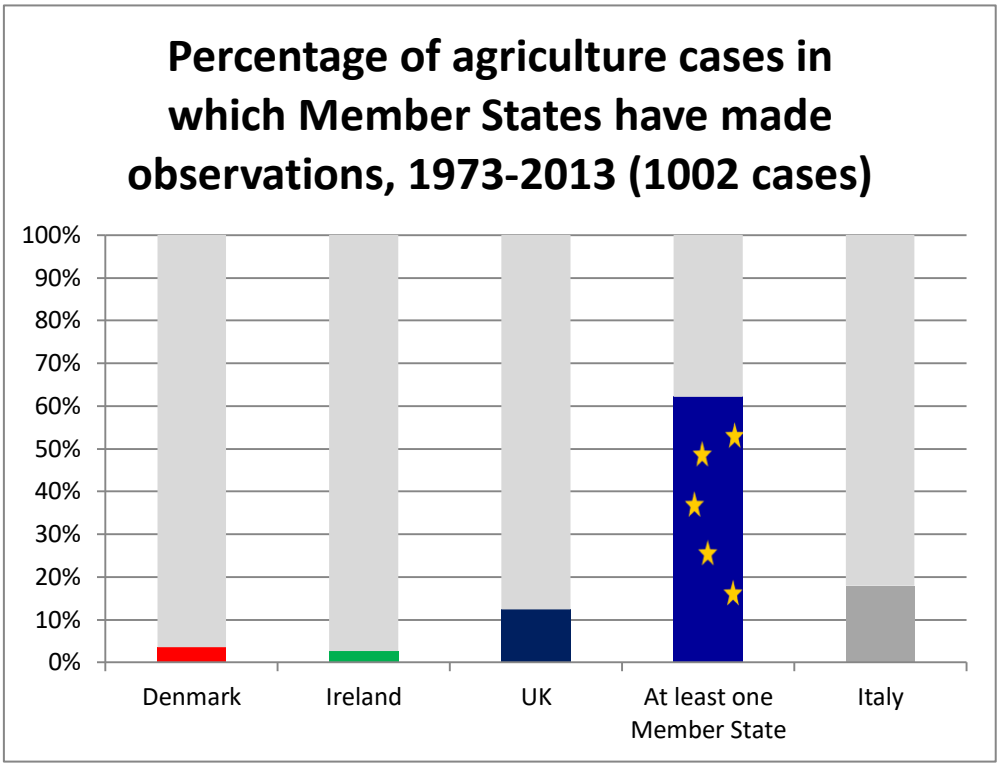
No.	*Question*	*Yes*	*No*
1	*Is it a preliminary reference from a Dutch judge?*		
2	*Is the Dutch government a litigant in the case before referring judge?*		
3	*Does the case potentially lead to modification of the regulations of (department)?*		
4	*Does the case potentially lead to modification of the policy or implementation practices of (department)?*		
5	*Does the case potentially lead to modification of forthcoming regulations or proposed policy of (department)?*		
6	*Could the case lead to a limitation of the discretion with regard to a core responsibility of (department)?*		
7	*Could this case take away uncertainties in the Netherlands about the correct application of the regulation?*		
8	*The policy area in question could be politically sensitive. This may give rise to two different questions:*		
8a	*Does answering the questions of the checklist give cause for making written observations, while that is politically* not *desirable?*		
8b	*Does answering the questions of the checklist* not *give cause for making written observations, while that* is *politically desirable?*		
9	*Are there possible financial consequences for (department) as a result of this case, also in the form of damages?*		
10	*Could the ruling in this case, because of the regulation at issue or because of its horizontal aspects, also have consequences for other departments than just (department)?*		
11	*Is there agreement with other departments (in sight)?*		
12	*Could the case have consequences for the European policy of the Netherlands?*		

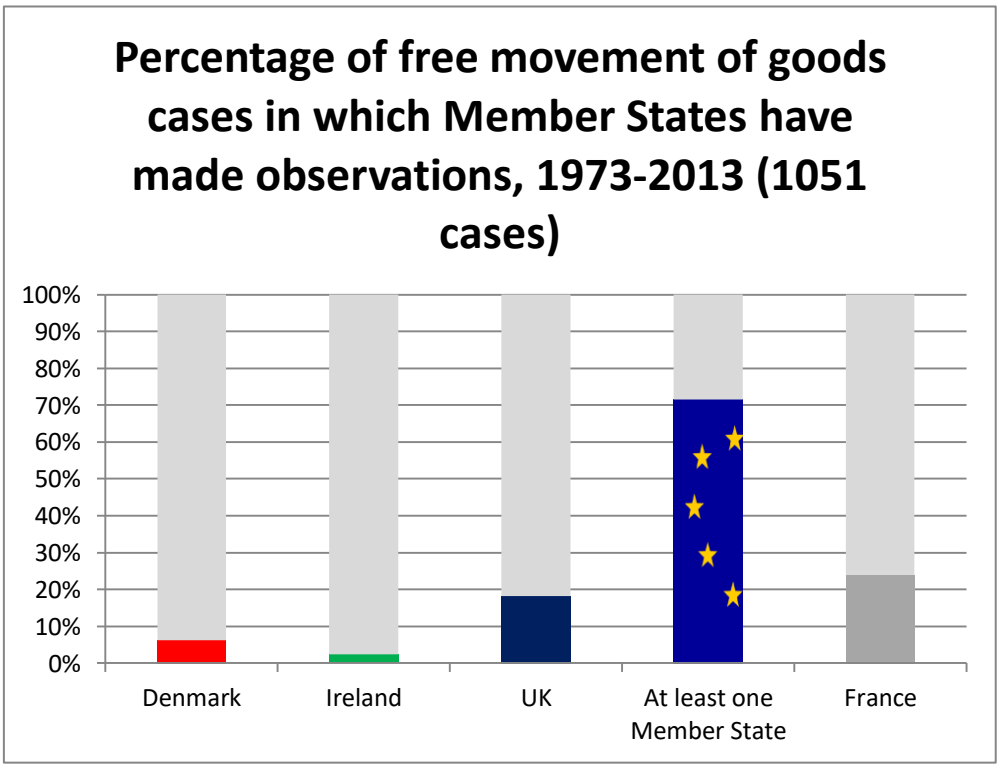
13 *Could this case lead to an important development in the European legal order?*

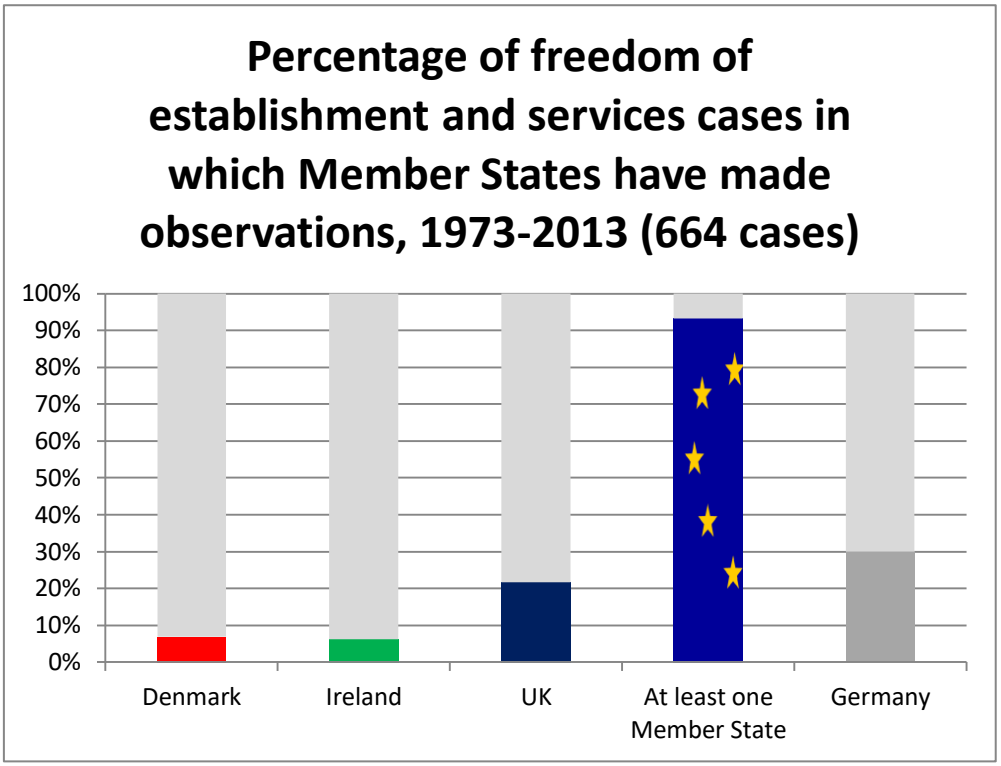
Do you propose intervention?

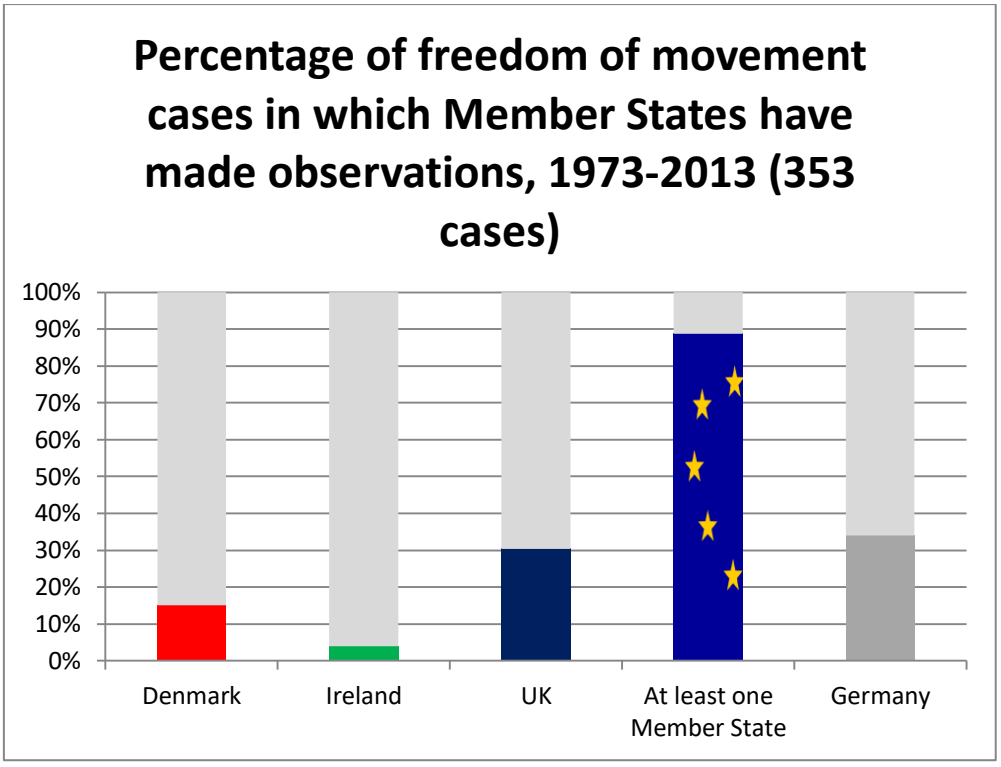
Document and translation with thanks to Floris van Stralen.

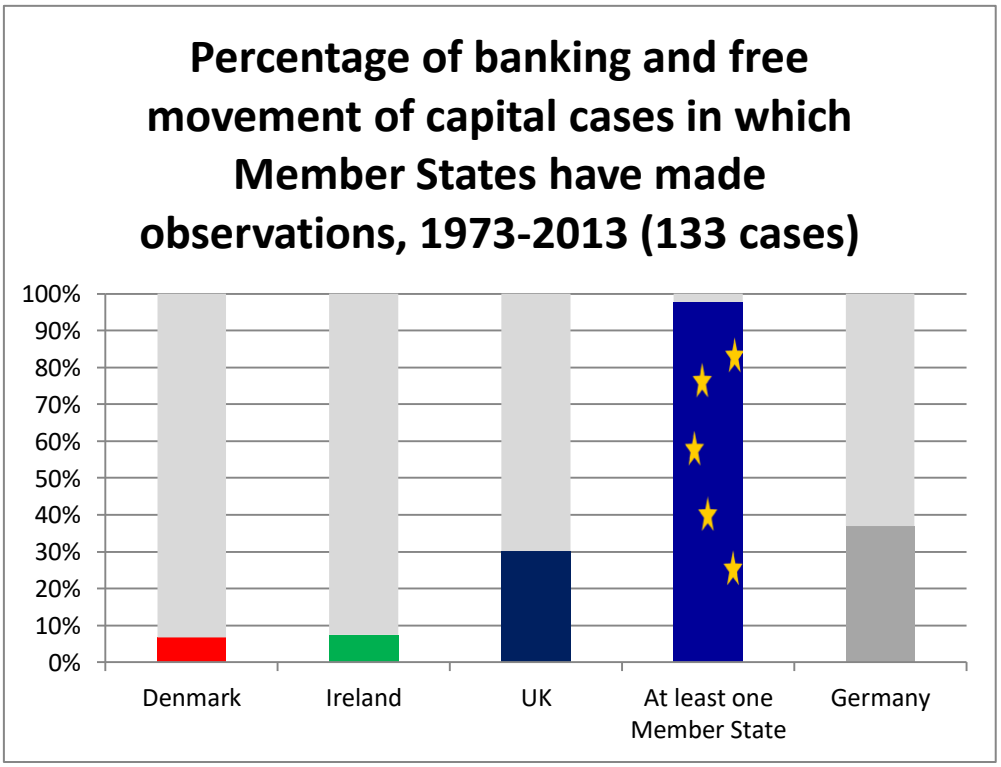
Appendix D Subject charts






Percentage of freedom of establishment and services cases in which Member States have made observations, 1973-2013 (664 cases)
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Denmark
Ireland
UK
At least one Member State
Germany


Percentage of freedom of movement cases in which Member States have made observations, 1973-2013 (353 cases)
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Denmark
Ireland
UK
At least one Member State
Germany


Percentage of banking and free movement of capital cases in which Member States have made observations, 1973-2013 (133 cases)
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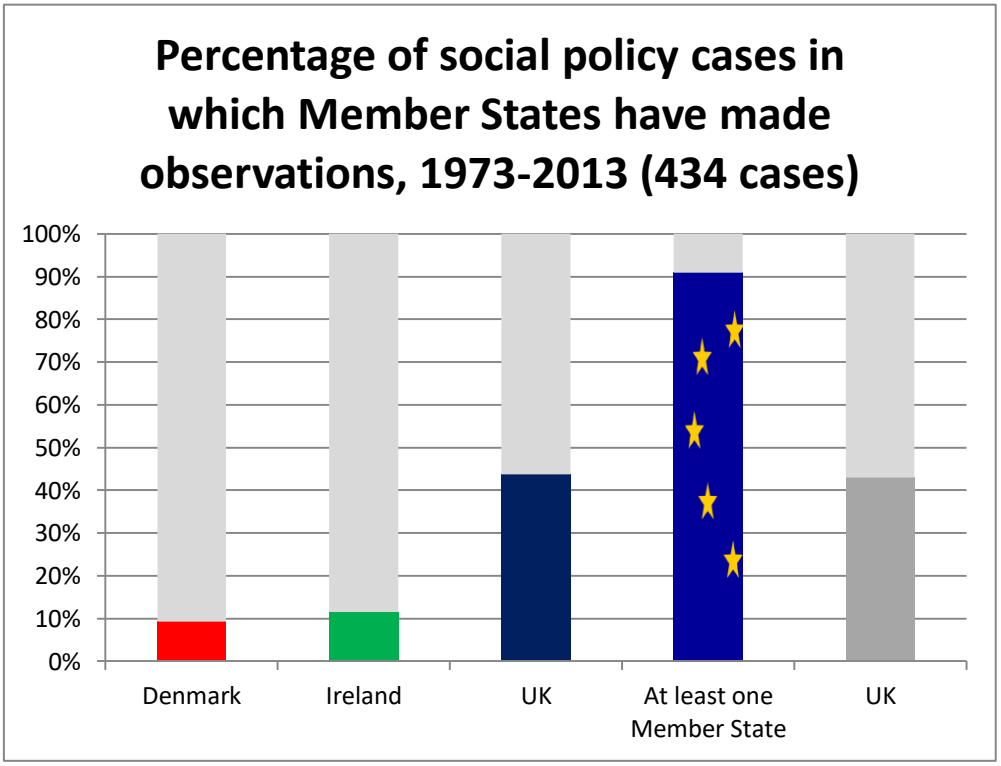
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Denmark
Ireland
UK
At least one Member State
Germany


Percentage of social policy cases in which Member States have made observations, 1973-2013 (434 cases)
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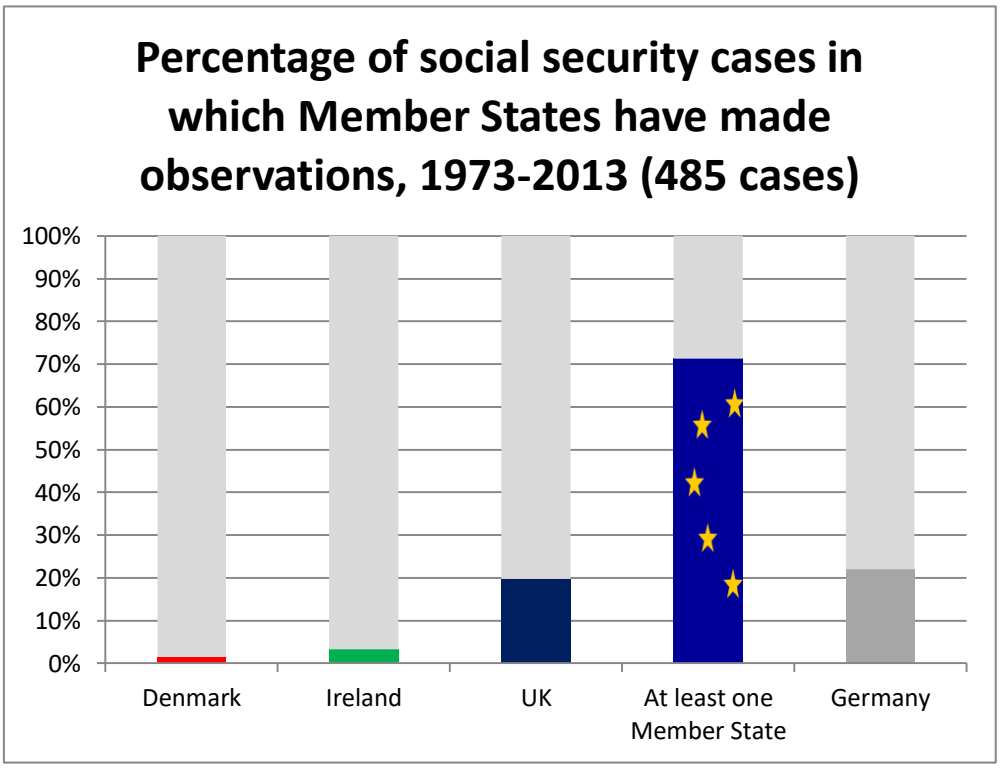
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Denmark
Ireland
UK
At least one Member State
UK


Percentage of social security cases in which Member States have made observations, 1973-2013 (485 cases)
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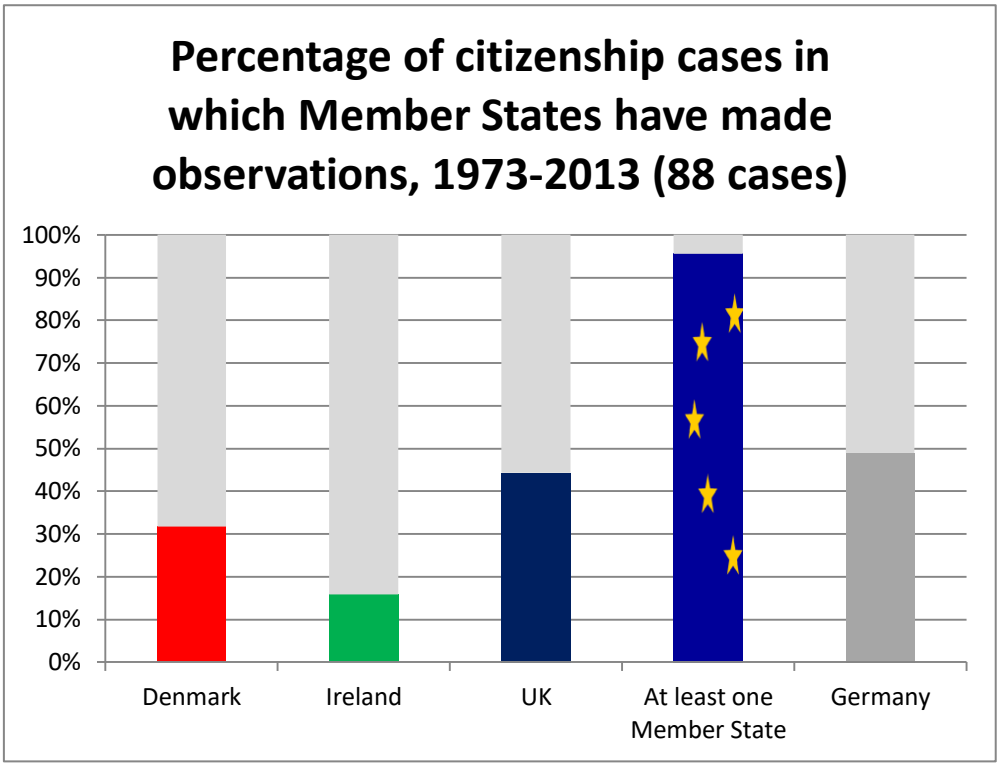
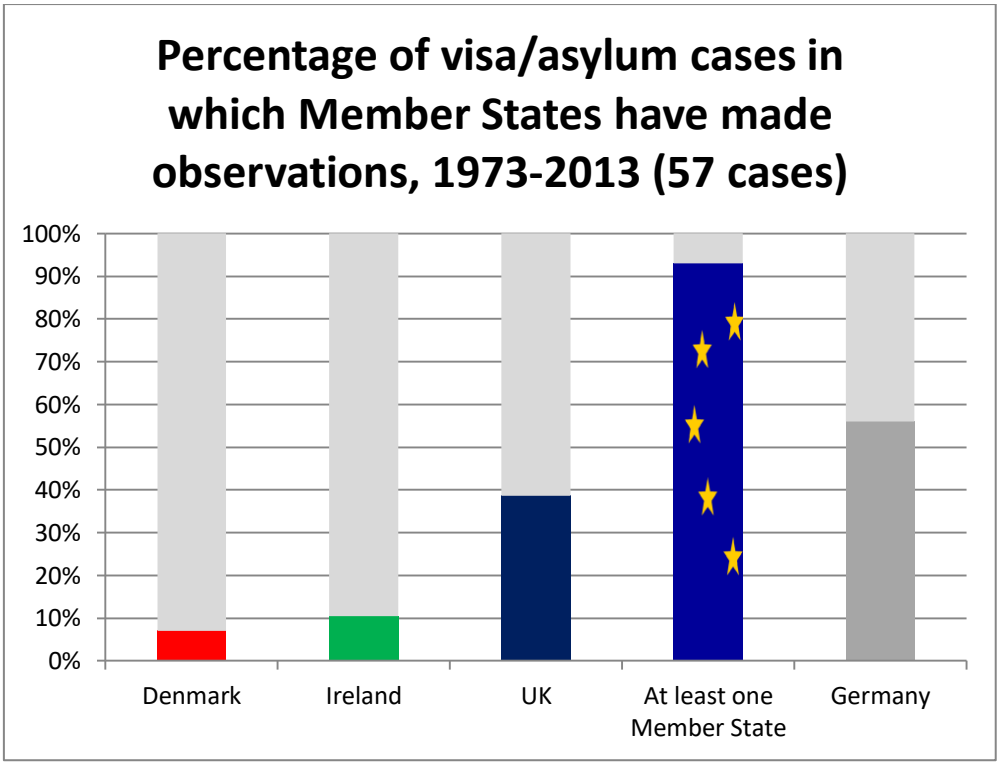
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Denmark
Ireland
UK
At least one Member State
Germany


Percentage of citizenship cases in which Member States have made observations, 1973-2013 (88 cases)
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Denmark
Ireland
UK
At least one Member State
Germany


Percentage of visa/asylum cases in which Member States have made observations, 1973-2013 (57 cases)
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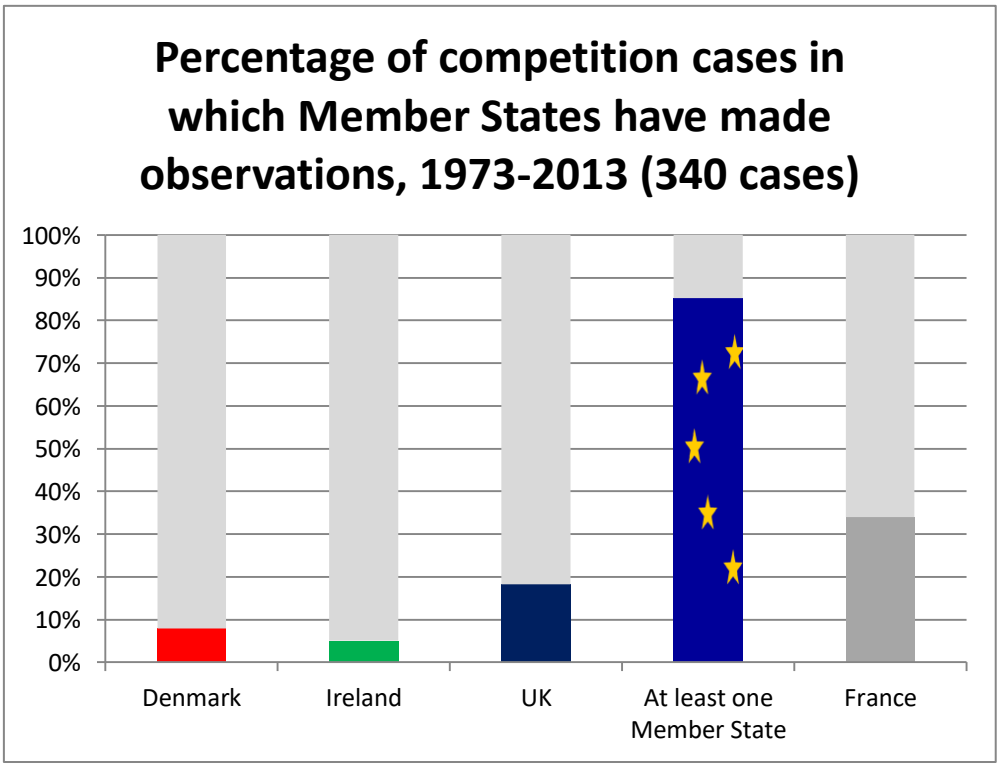
70%
60%
50%
40%
30%
20%
10%
0%
Denmark
Ireland
UK
At least one Member State
Germany


Percentage of competition cases in which Member States have made observations, 1973-2013 (340 cases)
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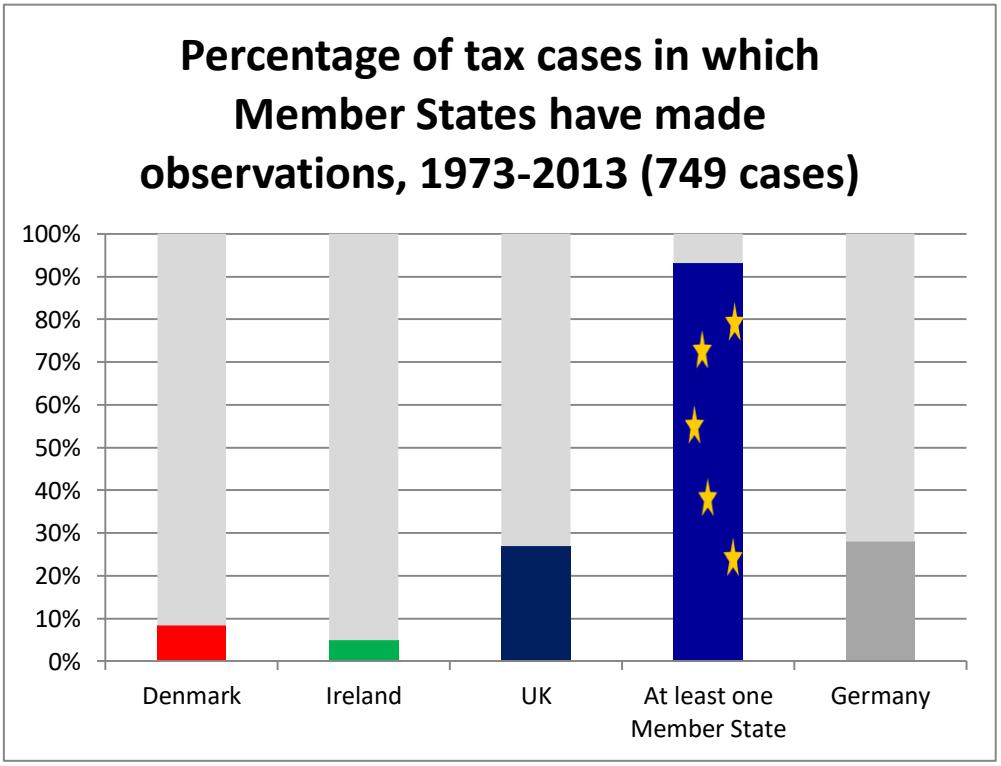
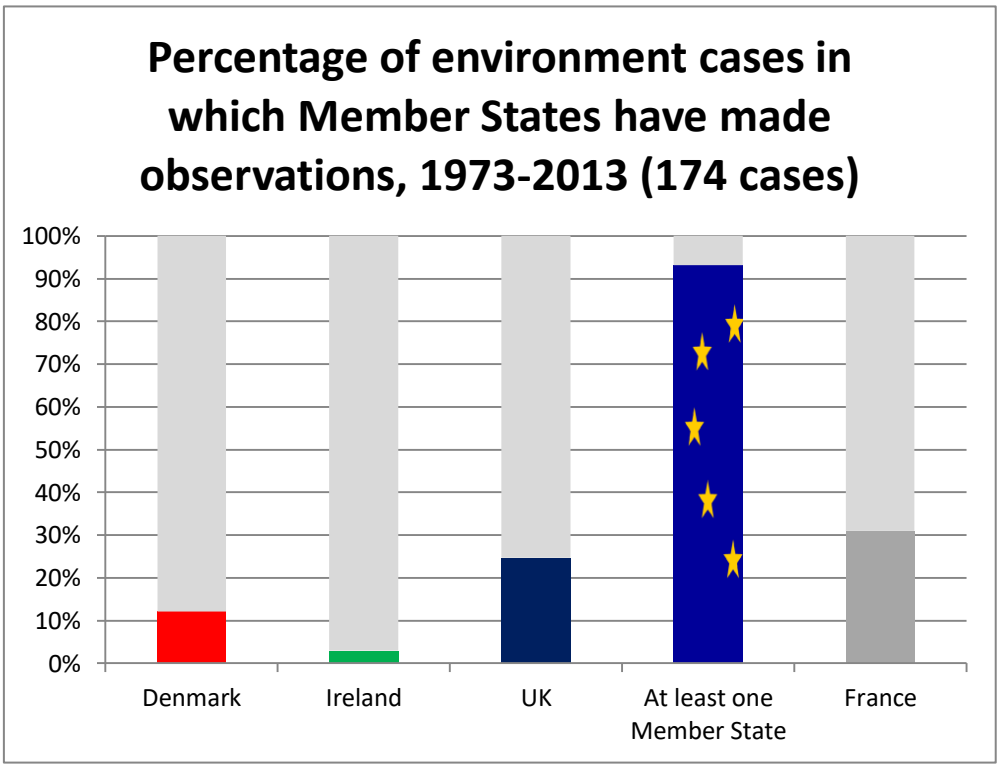
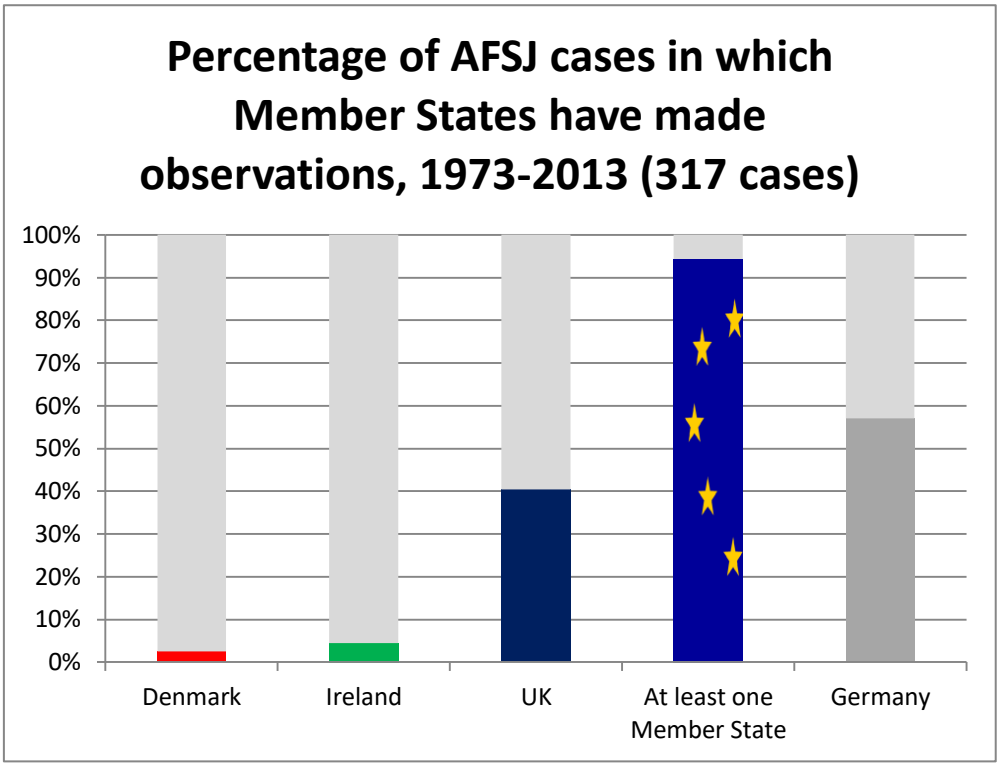
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Denmark
Ireland
UK
At least one Member State
France


Percentage of tax cases in which Member States have made observations, 1973-2013 (749 cases)
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Denmark
Ireland
UK
At least one Member State
Germany


Percentage of environment cases in which Member States have made observations, 1973-2013 (174 cases)
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Denmark
Ireland
UK
At least one Member State
France


Percentage of AFSJ cases in which Member States have made observations, 1973-2013 (317 cases)
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Denmark
Ireland
UK
At least one Member State
Germany

Appendix E Member States' observations by GDP

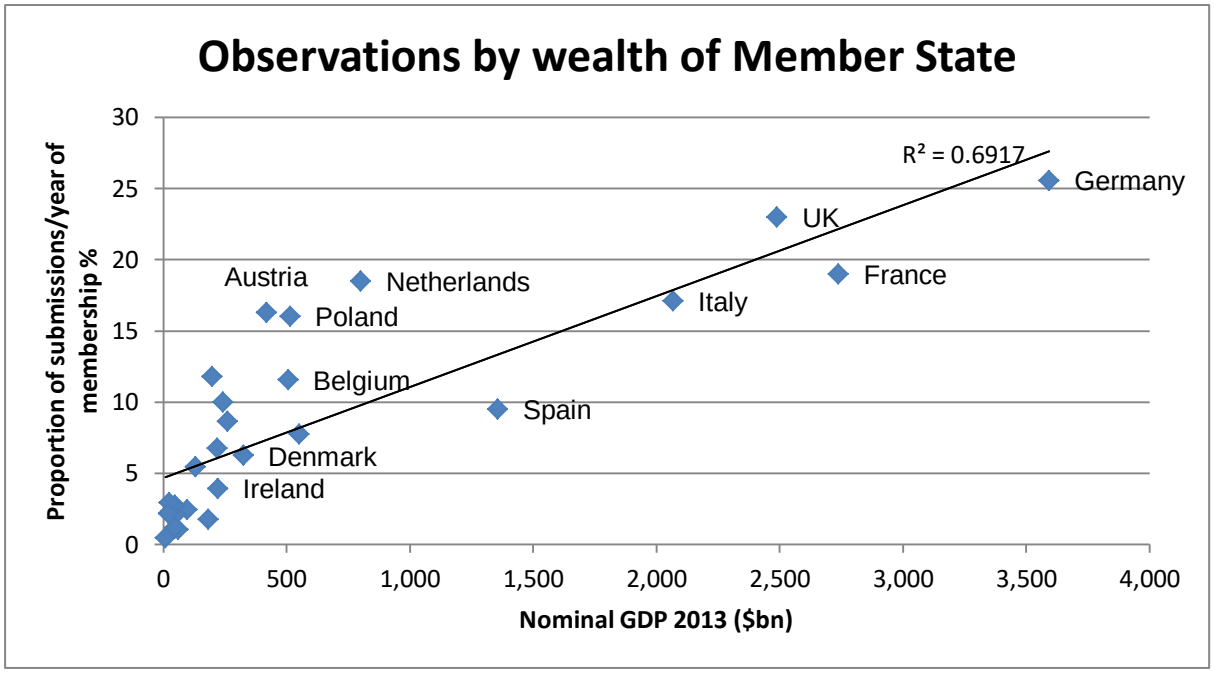


Figure 21: Observations by wealth of Member State

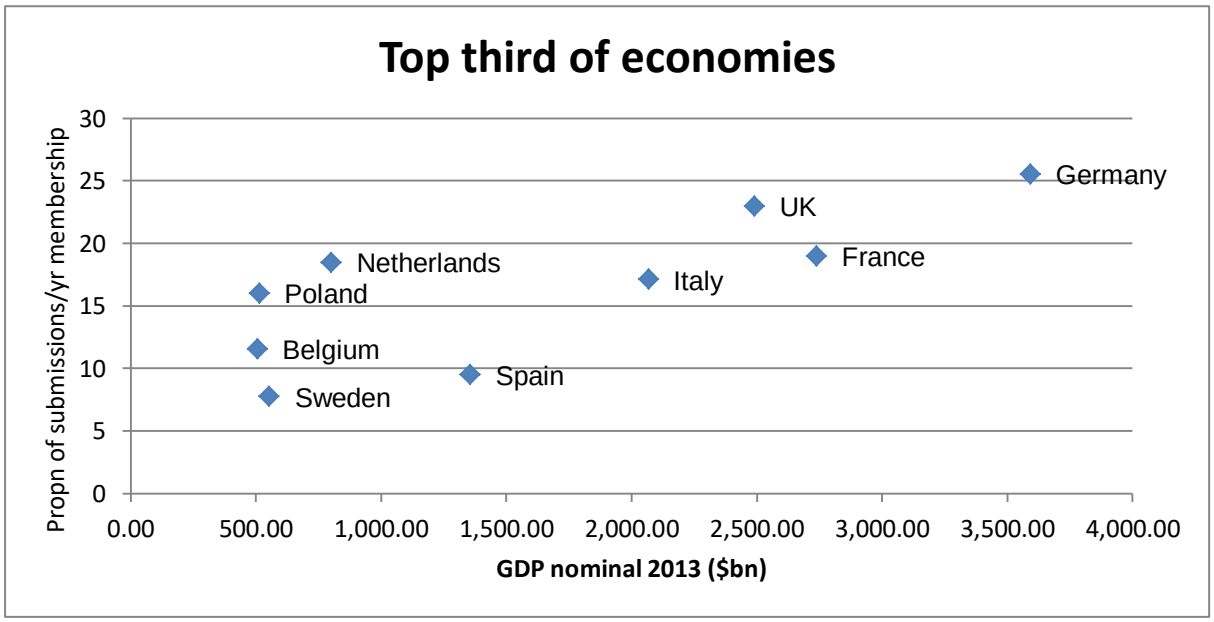


Figure 22: Top third of economies

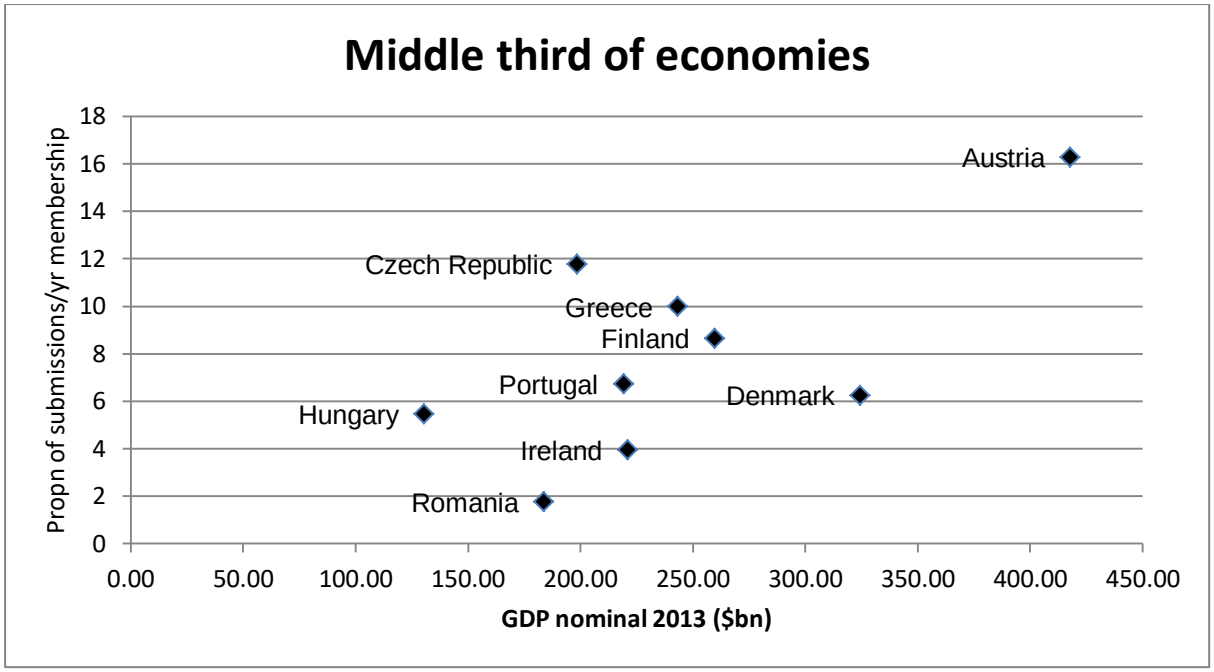


Figure 23: Middle third of economies

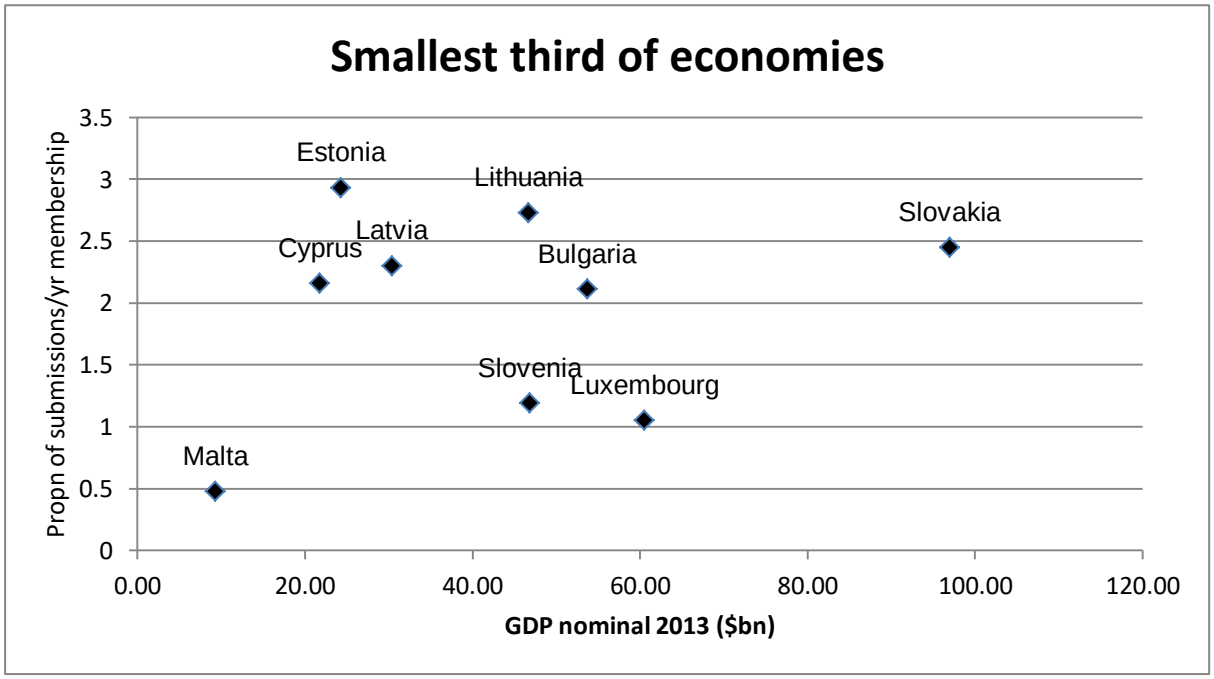


Figure 24: Smallest third of economies

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